APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 91-3275

GREGG FITZGERALD BAILEY and LIZZIE SHIRLEY BAILEY,
Plaintiffs-Appellants-Cross-Appellees,

v.

BOARD OF COUNTY COMMISSIONERS OF ALACHUA COUNTY, FLORIDA, EUGENE T. WHITWORTH, State Attorney of the Eighth Judicial Circuit of Florida, in his individual and official capacities, L.J. "LU" HINDERY, Sheriff of Alachua County, Florida, in his individual and official capacities, CITY OF GAINESVILLE, FLORIDA, JOHN STANTON TILESTON, SR., JAMES STRAUSS, FARNELL COLE, GARY BROWN, CHARLES JERKINS, TOM L. ALLISON, SPENCER MANN, STEPHEN GARRAHAN,
Defendants-Appellees,

NATHANIEL CALDWELL, COLLEEN HAYES,
Defendants-Appellees, Cross-Appellants.

March 31, 1992

Peter J. Hurtgen, Morgan, Lewis & Bockius, Miami, Fla., for Caldwell.

Thomas A. Bustin, Alachua Co. Atty's Office, Gainesville, Fla., for Hayes.

Robert C. Widman; Nelson, Hesse & Cyril, Sarasota, Fla., Joseph W. Little, Gainesville, Fla., for Bailey.

Ronald A. Labasky; Parker, Skelding, Labasky & Corry, Jennifer Parker Lavia, Tallahassee, Fla., for Cole.

Louis F. Hubener, III, Atty. Gen., Dept. of Legal Affairs, Tallahassee, Fla., for Tileston.

H. Jack Klingensmith; Jorden, Schulte & Burchette, Miami, Fla., for City of Gainesville.

Thomas H. Duffy, Tallahassee, Fla., for Allison.

Appeals from the United States District Court for the Northern District of Florida.

Before ANDERSON and DUBINA, Circuit Judges, and ESCHBACH*, Senior Circuit Judge.

ESCHBACH, Senior Circuit Judge:

Near the end of his graveyard work shift on May 14, 1987, Gregg Fitzgerald Bailey was arrested as the result of an undercover investigation at the Alachua County Detention Center (ACDC). Bailey had been a corrections officer (a prison guard) at ACDC since 1985. Based on his arrest and subsequent events, which included Bailey's suspension without pay from ACDC, Bailey and his wife (Lizzie Shirley Bailey) began this § 1983 action against two governmental entities (Alachua County and the City of Gainesville) and twelve individuals (Stephen Garrahan, James Strauss, Gary Brown, Tom L. Allison, John S. Tileston, Nate Caldwell, Colleen Hayes, Farnell Cole, Charles Jerkins, Spencer Mann, Eugene Whitworth and L.J. "Lu" Hindery) (collectively, "the defendants"). Most of the defendants exited this litigation either through summary judgments or dismissal motions prior to trial or through directed verdicts at the close of testimony, leaving only three defendants (Caldwell, Hayes and Alachua County) to go to the jury on Bailey's then-

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* Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

remaining claims. The jury returned a verdict in favor of Bailey against Caldwell and Hayes, awarding Bailey damages of $2,182,406. The jury exonerated Alachua County from liability. Bailey now appeals many of the summary judgments and directed verdicts as well as the jury's verdict for Alachua County; Caldwell and Hayes cross-appeal the jury verdict against them. As discussed below, we affirm in part, reverse in part, and remand for a new trial against Caldwell, Hayes and Allison solely on Bailey's procedural due process claims stemming from his suspension.

I. FACTS

A. Background

On April 22, 1987, several inmates attempted to escape from ACDC by sawing a window with hacksaw blades. Lieutenant Brown, with the assistance of another ACDC officer, investigated the attempted escape and discovered that an inmate-trustee (Tribuani) had obtained the blades from a tool box in a maintenance room to which he had been allowed access. Tribuani had concealed the blades in his pants until he was able to pass the blades to other inmates, one of which was Charles Jerkins. Subsequently, Jerkins twice informed Brown that persons who were not inmates had assisted in the escape attempt. After consultation with Allison, who was then Assistant Director of ACDC, Brown contacted the State Attorney's Office to investigate the potential wrongdoing by ACDC employees.

As a result of Brown's contact, Tileston, who was serving as a Special Prosecutions Investigator with the State Attorney's Office, was assigned to investigate Jerkins' allegations. Tileston spoke with Brown, who told him that Jenkins' had said that a "professional person" had assisted in the April escape attempt.[1] Tileston was fa-

[1] Although Brown had completed a full report regarding his own investigation into the escape attempt, he did not give Tileston this written investigative report.

miliar with Jerkins because Jerkins was well known as both a criminal and a "snitch" to local law enforcement authorities. Tileston testified that Jerkins was a "known credible police source" and that he had verified through city and county law enforcement officers that Jerkins had provided reliable information in the past. Tr. 38-575-12, 13; Tr. 27-561-129, 130.

On May 8, 1987, Tileston interviewed Jerkins and Jerkins named Bailey as a participant in bringing hacksaw blades into the jail. Jerkins described letters he had written to his girlfriend in which he had urged her to contact Bailey to arrange to bring hacksaw blades into the jail. Jerkins said that he and Bailey had developed a prior personal relationship. Jerkins knew Bailey's phone number and told Tileston that he had offered Bailey both $500 and $1000 for hacksaw blades.

Tileston decided that he needed to test whether Bailey would accept money from Jerkins, and devised an undercover plan for this purpose. Because his office did not have the necessary equipment for his plan, Tileston obtained $500 cash and a body bug from the combined Gainesville/Alachua County Narcotics and Organized Crime Unit (NOCU). Furthermore, NOCU's Deputy Cole was assigned to provide Tileston technical assistance with the listening equipment. Tileston's plan was to give Jerkins the $500 with instructions to offer it to Bailey. A body bug would be placed on Jerkins so that any conversations between Bailey and Jerkins could be heard and recorded. Cole's responsibility was to monitor the listening equipment.

B. Bailey's Arrest

Tileston elected to conduct his test during Bailey's May 14 work shift. Brown, who was serving as Tileston's liaison with ACDC, arranged to wire Jerkins and to give him the $500 before Bailey came on duty. One of Brown's Lieutenants (Strauss) actually placed the body

bug on Jerkins and gave him the $500. Jerkins was instructed to tell Bailey he had the money and to try to get into a conversation with Bailey about hacksaw blades. Although Bailey had access to Jerkins throughout his shift because he was responsible for the jail area in which Jerkins was housed, a further opportunity for conversation between the two men was contrived when Tileston had one of Bailey's superiors instruct Bailey to remove Jerkins from his cell (ostensibly for more fingerprinting and charges) and then put him back.

Reception from the body bug was poor; Cole reported hearing a few snippets of conversation through his listening device, but a tape recording made of this conversation was later found to be inaudible. Specifically, at 12:08 a.m. Cole reported hearing Jerkins mention the "$500." Tileston, Brown and Cole, who were stationed in Allison's office, continued their monitoring throughout the night. At 6:21 a.m., Cole reported that he heard mention of "hacksaw blades" transmitted through Jerkins' body bug. At this time, Tileston wanted to know if the money had passed from Jerkins to Bailey. Brown ascertained through Sullivan that the money had passed to Bailey and relayed this information to Tileston. After a brief discussion, and wanting to capture the money before Bailey's shift ended at 7:00 a.m., Tileston and crew headed for the part of the jail where Bailey was stationed.

After locating Bailey, who was supervising the morning feeding of the prisoners, Tileston and Cole showed Bailey their badges and were introduced by Brown. Tileston then asked Bailey to accompany them to Allison's office to answer questions. No conversation transpired between Bailey and these officers during the five to ten minute walk to Allison's office. In Allison's office, Tileston informed Bailey that he was under arrest and Cole read Bailey his *Miranda* rights. After being asked about the money, Bailey removed it from his right front pants pocket, put it on the desk, and made a statement

that no fingerprints would be found on the money. The money was wrapped in white paper. Bailey also said that he had talked to two officers about what was happening, but gave no specific information about these contacts. Tr. 38-575-47, 36-568-34 to 36. Bailey then requested an attorney and questioning ceased.

What Bailey's version of the arrest and the events leading up to it add to this account is insubstantial. Bailey's story reveals that Jerkins handed him a sock full of money, which he took because he knew he was supposed to confiscate contraband in the jail. According to Bailey, he dumped the money onto a piece of white paper, hoping to preserve the fingerprints of whomever had given the money to Jerkins. At first, Bailey put this bundle into a desk, and then twice tried with no avail to reach a supervisor. When Bailey noticed several inmate-trustees approaching, however, he feared for the money's security and removed it from the desk and placed it in his pocket. He then went about his duties of overseeing inmate feeding, thinking that he would notify a supervisor once that duty was finished. He was arrested while attending to this duty.

C. Bailey's Suspension

On the morning of his arrest, Bailey was given a letter written by Allison suspending him without pay "as of 0700 hours May 14, 1987" and stating that dismissal proceedings would be taken against him if he had not "rectified the prerequisites of his job within 15 days." Bailey was then notified a second time that he was suspended without pay. By letter dated May 26, 1987, Allison advised Bailey that "effective today, you are hereby placed on suspension without pay until further notice." The parties' third communication was a November 19, 1987 letter from Bailey to Caldwell (Alachua County's Director of Corrections) asking for reinstatement, or a hearing if reinstatement was denied, or information on

how to reqest a hearing if he was proceeding improperly. A decision by the State Attorney's Office to enter a *nolle prosequi* as to all criminal charges filed against Bailey had prompted this letter to Caldwell. Caldwell directed Bailey's letter to Allison,[2] who responded on December 7, 1987 by denying Bailey's request and noting that his "leave without pay" would continue pending the completion of an investigation. ACDC had requested that the Florida Department of Law Enforcement (FDLE), the body charged with certifying Florida's law enforcement officers, investigate the possibility of decertifying Bailey.

The FDLE informed Caldwell that there was no basis for further action against Bailey via letter of June 9, 1988. Garrahan then requested that FDLE reopen its investigation, the status of which was uncertain at the time of trial. Caldwell, however, instructed Edward A. Royal, who replaced Allison when he left ACDC on February 13, 1988, to order Bailey back to work. By letter dated June 15, 1988, Royal informed Bailey that he would receive back pay and ordered him to report to work on June 20, 1988.

D. Bailey's Reinstatement

Bailey reported to work on June 20, with his lawyer and a letter from his psychiatrist in tow. Dr. Waldman, who had been treating Bailey since March 1988, Tr. 24-572-177, advised Bailey against returning to work at ACDC at that time. Thus, Bailey requested his back pay and asked that he be placed on sick leave until his benefits were exhausted, then placed on annual leave. *See* Plaintiffs Exhibit 13-A (Bailey's counsel's letter); Deposition Exhibit 52 (Bailey's hand-delivered letter to this effect). The following day, Dr. Waldman initiated an involuntary commitment to Shands Hospital on behalf of Bailey. Dr. Waldman diagnosed Bailey as suffering from a psy-

[2] Caldwell was no longer Director of Corrections; Allison was Acting Director of Corrections.

chotic breakdown and considered him to be a threat to himself and others (particularly at ACDC). Bailey's status at Shands was subsequently converted to voluntary and he remained there for about five weeks.

Although Royal's June 15, 1988 letter promised Bailey "any and all back pay and entitlements," no monies were tendered to Bailey until September 29, 1989, almost a year after Bailey filed this lawsuit. *See* Defendant's Exhibit 4. The record is unclear as to whether this was an unconditional tender of back pay or an effort at settlement. *See* Defendant's Exhibit 5. In any case, it is uncontroverted that the check (wherever and whatever it may be) has not been cashed. Tr. 32-480-29 to 32. The record also leaves unclear Bailey's status with ACDC at the time of trial. No hearings have been held regarding Bailey's employment status with ACDC.

II. PROCEDURAL HISTORY

Bailey's First Amended Complaint (the "Complaint") sought compensatory, punitive and injunctive relief pursuant to 42 U.S.C. § 1983 and state law. The Complaint alleged under § 1983 that the defendants deprived Bailey of liberty and property without due process of law, and conspired to do so, by arresting him without probable cause, publicizing the arrest, and subsequently suspending him. The Complaint also alleged pendent state-law causes of action based on false arrest, malicious prosecution, evil conspiracy, and violation of state civil rights. For analytical ease we have classified Bailey's claims into five categories: (1) Bailey's § 1983 claim that various defendants violated his due process rights by depriving him of a protected property interest in his employment by suspending him without pay and without granting him a hearing (the "procedural due process claim"); (2) Bailey's § 1983 claim that various defendants violated his due process rights by depriving him of a protected liberty interest by maintaining stigmatizing information

in his personnel file and not granting him a name-clearing hearing (the "name-clearing hearing claim"); (3) Bailey's § 1983 claim that various defendants conspired to deprive him of his civil rights (the "conspiracy claim"); (4) all of Bailey's claims concerning his allegedly unlawful arrest and the publication to the news media of the arrest (the "arrest-related claims"); and (5) all of Bailey's remaining state claims and all of Lizzie Shirley Bailey's loss of consortium claims, none of which has been raised on appeal. Accordingly, we deem waived any challenge to the district court's orders on this final category of claims.

All defendants filed motions to dismiss and/or motions for summary judgment in response to Bailey's Complaint. In July 1990, the district court entered an omnibus order granting in part motions to dismiss or for summary judgment filed by various defendants. In that order, the district court granted summary judgment on the basis of qualified immunity as follows: to Brown, Allison, Caldwell, Cole and Hayes on Bailey's conspiracy and arrest-related claims; to Brown and Cole on Bailey's procedural due process claim; and to Allison, Caldwell and Hayes on part of Bailey's procedural due process claim (his "initial" suspension).[3] The district court denied Allison, Caldwell, Hayes and Alachua County qualified immunity as to Bailey's procedural due process claim regarding his "continued" suspension; denied Tileston, City of Gainesville, Alachua County, Garrahan, Strauss and Hindery qualified immunity as to Bailey's conspiracy and arrest-related claims; and denied Caldwell, Hayes, Alachua County, City of Gainesville, Hindery, Tileston, Strauss, Garrahan, and Brown qualified immunity with respect to Bailey's name-clearing hearing claim. The district court also dismissed all of Lizzie Shirley Bailey's

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[3] The district court's reference to "initial" and "continuing" suspension has resulted in substantial confusion. We resolve this issue infra at part III(A)(3).

loss of consortium claims, none of which is at issue in this appeal.

A five-week jury trial on Bailey's remaining claims began on July 9, 1990. On that date, the district court orally granted Allison summary judgment on all remaining claims, dismissing him from this litigation. At the close of Bailey's case, all defendants moved for directed verdicts on various grounds; the district court deferred ruling on the motions until the close of all evidence. At that time, the remaining defendants renewed their directed verdict motions and Bailey moved for directed verdict as well. The district court denied Bailey's motion, but granted directed verdicts for Tileston, Alachua County, City of Gainesville, Strauss, Garrahan and Hindery as to Bailey's conspiracy and arrest-related claims. The basis of the district court's ruling was that Tileston had probable cause to arrest Bailey. The district court also directed verdicts in favor of all defendants on all of Bailey's state claims, none of which is at issue in this appeal. Furthermore, the district court directed verdicts in favor of Tileston, City of Gainesville, Strauss, Brown, Garrahan and Hindery on Bailey's name-clearing hearing claim. These directed verdicts left three defendants (Caldwell, Hayes and Alachua County) and two claims (procedural due process and name-clearing hearing) for the jury. After the jury returned its verdict for Alachua County, and for Bailey against Caldwell and Hayes on both claims, Bailey, Caldwell and Hayes filed motions for directed verdicts, judgments notwithstanding the verdict, or a new trial. The district court denied all motions and this appeal followed.

III. DISCUSSION

A. Bailey's Appeal

1. *Arrest-Related Claims*

Bailey asserts that the district court erred in granting directed verdicts in favor of City of Gainesville, Alachua County, Hindery, Garrahan, Strauss and Tileston on his

arrest-related claims. In granting these six defendants directed verdicts, the district court first found that Tileston had probable cause to arrest Bailey. Bailey argues, however, that Tileston did not have probable cause to arrest him of any crime [4] and that the defendants conspired to, and did, falsely arrest and prosecute him. Furthermore, Bailey asserts that the defendants "individually and collectively possessed information that would lead a reasonable and honest person to know that he was innocent." Brief of Appellant 24. If Tileston had probable cause for the arrest, then these defendants did not violate Bailey's Fourth Amendment rights against false arrest as protected through § 1983. *See Marx v. Gumbinner*, 905 F.2d 1503, 1505-06 (11th Cir.1990) (existence of probable cause is an absolute bar to a § 1983 action premised on false arrest). Specifically, Bailey argues that the district court erred by taking the question of probable cause from the jury. We disagree. When considering whether a directed verdict should be upheld, our standard is the same as that applied by the district court. *Carter v. City of Miami*, 870 F.2d 578, 581 (11th Cir.1989). Thus, we consider all the evidence and resolve all inferences in the light most favorable to the nonmoving party. If the facts and inferences point overwhelmingly in favor of one party, such that reasonable people, in the exercise of impartial judgment, could not arrive at a contrary verdict, then the motion was properly granted. *Id.* A mere scintilla of evidence does not create a jury question;

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[4] Bailey's arrest report reflects a violation of Florida Statute § 843.11, conveying tools into jail to aid escape. Tileston's post-arrest investigation, however, led him to doubt that Bailey had been involved in the April escape attempt, and Bailey was subsequently charged with bribery, unlawful compensation and unlawful possession of $500 in the jail instead. Tr. 37-574-48; Ex. 31. Bailey's efforts to attach significance to this change, however, is unpersuasive. The validity of an arrest does not turn on the offense announced by the officer at the time of the arrest. *United States v. Saunders*, 476 F.2d 5, 7 (5th Cir.1973); *State v. Cote*, 547 So.2d 993, 996 (Fla. 4th DCA 1989).

there must be a substantial conflict in evidence to create a jury question. *Id.*

We (and the district court) must evaluate these facts and inferences according to the legal standard for probable cause.[5] Simply stated, that standard requires that an arrest be objectively reasonable under the totality of the circumstances. *See Illinois v. Gates*, 462 U.S. 213, 229, 103 S.Ct. 2317, 2327, 76 L.Ed.2d 527 (1983). A familiar formulation holds that a "law enforcement officer has probable cause to arrest a suspect if the facts and circumstances within the officer's knowledge, of which he or she has reasonably trustworthy information, would cause a prudent person to believe, under the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Von Stein v. Brescher*, 904 F.2d 572, 578 (11th Cir.1990). Probable cause requires more than mere suspicion, but does not require convincing proof. Indeed, "[t]he Constitution does not guarantee that only the guilty will be arrested. If it did, § 1983 would provide a cause of action for every defendant acquitted." *Baker v. McCollan*, 443 U.S. 137, 145, 99 S.Ct. 2689, 2695, 61 L.Ed.2d 433 (1979).

The district court properly found that Tileston had probable cause to arrest Bailey by examining what the evidence revealed that Tileston knew at the time of the arrest. Tileston knew that an escape attempt had occurred at ACDC in April and that one of the inmates

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[5] We note that Bailey's briefs to this Court mistakenly conflated the standards that a court uses in ruling on a directed verdict motion and the standard that an arresting officer must use in determining whether probable cause for an arrest is present. An officer is not required, as Bailey argues, to resolve all inferences and all factual conflicts in favor of the suspect. An officer's decision to arrest a suspect may be objectively reasonable even though that officer has not specifically discarded every possible non-criminal explanation for the conduct that forms the basis for her decision to arrest a suspect. *See United States v. Pantoja-Soto*, 739 F.2d 1520 (11th Cir.1984), *cert. denied*, 470 U.S. 1008, 105 S.Ct. 1369, 84 L.Ed.2d 389 (1985).

involved in that escape attempt had implicated Bailey. Tileston had investigated this tip by interviewing Jerkins personally and by checking Jerkins' reliability with city and county law enforcement officers even though Tileston was already familiar with Jerkins. Bailey did not controvert this at trial. Tileston also knew that Cole had heard a comment regarding the $500 transmitted through Jerkins' body bug around midnight. At trial, Bailey admitted that around midnight Jerkins had said "I want out. I want to get out. I've got $500 for you now and $1,000 for you Sunday night," and that Bailey had responded by telling him to "stay cool." Tr. 24-572-140. Bailey also admitted that he never notified anyone of Jerkins' midnight bribe attempt during his shift. Tr. 25-573-61 to 65. Although Bailey testified that he had twice *attempted* to notify his sergeant *after* taking the money from Jerkins, he admitted that he did not succeed in communicating with anyone. The district court accepted Bailey's testimony regarding his notification attempts as true, but correctly noted that it was also true that Bailey did not communicate this fact to anyone "at, near, or after his arrest." Tr. 39-576-109. Furthermore, Tileston knew that the money had passed to Bailey through Brown's verification. *Id.* at 112-13. And finally, Tileston knew that Bailey said nothing about having the money in his pocket when confronted in his work area, when walking to Allison's office, and when informed he was under arrest in Allison's office. Only when asked did Bailey turn over the $500.

Moreover, in directing a verdict for these defendants based on probable cause, the district court properly accepted as true Bailey's version of the events. *See* Tr. 39-576-107 to 114. The flaw in Bailey's efforts to undermine Tileston's probable cause is that Bailey's version of the facts failed to create a substantial conflict in what Tileston knew at the time of the arrest.[6] For instance,

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[6] Bailey argues that Cole, not Tileston, arrested him. Bailey has not shown a substantial conflict in the evidence regarding who

Bailey makes much of his prior communications with Strauss, Garrahan and Phillips regarding inmate contacts. Bailey testified that he had previously talked with Strauss regarding inmate contacts and that he had written Garrahan a letter in February 1987 regarding inmate contacts, which Garrahan referred to Strauss. Bailey also testified that he told Strauss that he had been approached again by an inmate [7] as Strauss was leaving ACDC and Bailey was arriving the evening prior to Bailey's arrest. Furthermore, Bailey testified that he told Phillips, the corrections officer on duty with Bailey the night of his arrest, generally about *prior* inmate contacts and his communications with Strauss and Garrahan. Although the lack of communication among ACDC personnel is unfortunate,[8] none of Bailey's prior discussions

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arrested him. Testimony from Bailey, Tileston, Brown and Cole supports that it was Tileston who arrested Bailey. Bailey takes Cole's statement that an arrest may have "technically" occurred when he and Tileston first confronted Bailey rather than later in Tileston's office out of context to make this argument. We need not decide this issue, because we find that Tileston had probable cause to arrest Bailey at either point. Tileston testified that he made the decision to arrest Bailey in Allison's office after learning that the money had passed from Jerkins to Bailey. Thus, from the time Tileston left that office to confront Bailey and bring him back to Allison's office, no facts changed that would disturb the district court's probable cause decision.

[7] Unknown to Tileston (or anyone else), Jerkins had taken it upon himself to phone Bailey at home during the afternoon prior to Bailey's arrest in an unplanned effort to further entice Bailey into conversation with him.

[8] Moreover, ACDC's poor communication was enhanced by the nature of an undercover internal investigation, where the methodology involved isolation and deference to a "need to know" communication standard. In addition, Bailey's prior communications were all vague or general references to inmate contacts—none mentioned Jerkins (or anyone else) by name. This level of generality made it less likely that these communications would have retained significance in the minds of Garrahan and Strauss in the face of their (and others') testimony that inmate contacts are a common problem that

was reported to Tileston. The record is clear that Tileston did not know of these prior communications until months after the arrest. It was also uncontroverted that Strauss told *no one* of Bailey's comment during shift change the evening prior to Bailey's arrest. Bailey also points to the fact that Brown had not given Tileston his written investigative report concerning the April escape attempt, and argues that had he done so Tileston would have known that he was innocent. Bailey, however, overstates the significance of this omission. Brown's written report, apparently unlike his oral report to Tileston, would have told Tileston that Tribuani had confessed to his role in the April escape attempt. The report would not have definitively established the source of the hacksaw blades used in that escape attempt, nor would it have ruled out the possibility that another escape attempt (involving Bailey) was being formulated. Thus, none of these factors that Bailey points to undermine what Tileston did know at the time of the arrest;[9] none of these factors undermine the district court's determination that Tileston had probable cause to make that arrest.[10] Ac-

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jail personnel must handle. In any case, Bailey's arguments that communication between the ACDC officers should have been better are misdirected. Negligent acts do not give rise to § 1983 liability. *Daniels v. Williams*, 474 U.S. 327, 336, 106 S.Ct. 662, 667, 88 L.Ed.2d 662 (1986).

[9] At trial, each officer asked testified that Bailey should have immediately notified his superior when Jerkins attempted to bribe him and especially when he actually accepted the $500. They also testified that Bailey could have interrupted his feeding duty with no breach of security to notify someone that he had just confiscated $500. *See, e.g.*, Tr. 28-562-255 to 257. Once again, Bailey's arguments that he might have taken the $500 because it was contraband, not because he was taking a bribe (like his explanation of why he had the money in his pocket), affect his ultimate guilt or innocence, not the reasonableness of Tileston's decision to arrest him. To restate, Bailey did not have to be guilty to be arrested.

[10] Although the district court indicated that the defendants were entitled to the protection of qualified immunity once probable cause

cordingly, we agree that Tileston had probable cause to arrest Bailey and we affirm the district court's final judgments for all defendants with respect to all of Bailey's arrest-related claims.

2. *Conspiracy Claims*

As noted above, Bailey's theory of this case was not only that the defendants had falsely arrested him, but also that they had *conspired* to deprive him of his civil rights by arresting, jailing and suspending him without due process of law. The district court, however, found that there was a "total lack of evidence" to support Bailey's theory that Alachua County, Hindery, City of Gainesville, Strauss, Tileston and Garrahan conspired to deprive him of his property and liberty by falsely arresting him, jailing him, and suspending him from his job. Tr. 39-576-114. Our *de novo* review of the record supports the district court's conclusion. No reasonable juror could have found a conspiracy because Bailey presented no evidence of one. To prove a 42 U.S.C. § 1983 con-

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was found, see Tr. 39-576-113-14, we note that granting qualified immunity on this basis was an unnecessary step. If probable cause is present, there is no need for the defendants to rely on the qualified immunity defense. "The existence of probable cause . . . is an absolute bar to a section 1983 action for false arrest." *Marx v. Gumbinner*, 905 F.2d 1503, 1505-06 (11th Cir.1990). Because we uphold the district court's finding of probable cause, we do not address the question of whether the defendants may have been entitled to qualified immunity in the absence of probable cause. Although several defendants argue that only "arguable probable cause" is necessary for qualified immunity, we do not reach that issue. *Compare Von Stein v. Brescher*, 904 F.2d 572, 579 (11th Cir. 1990) ("In determining whether qualified immunity exists, the issue is 'not probable cause in fact but "arguable" probable cause,'" quoting *Gorra v. Hanson*, 880 F.2d 95, 97 (8th Cir.1989), in turn quoting *Floyd v. Farrell*, 765 F.2d 1, 5 (1st Cir.1985)) *with Llaguno v. Mingey*, 763 F.2d 1560, 1569 (7th Cir.1985) (en banc) (Judge Posner noting that giving defendants an opportunity for qualified immunity in the absence of probable cause gives them "two bites at the apple").

spiracy, a plaintiff "must show that the parties 'reached an understanding' to deny the plaintiff his or her rights [and] prove an actionable wrong to support the conspiracy." *Bendiburg v. Dempsey*, 909 F.2d 463, 468 (11th Cir.1990), *cert. denied*, —— U.S. ——, 111 S.Ct. 2053, 114 L.Ed.2d 459 (1991). This, Bailey did not do. Indeed, the record in this case reveals just the opposite of conspiracy. Whereas the linchpin for conspiracy is agreement, which presupposes communication, the defendants in this case suffered from an extreme lack of communication. Thus, we agree with the district court that Bailey failed to establish his conspiracy theory of liability and affirm the district court's final judgments for all defendants on this claim.

3. *Procedural Due Process Claims*

a. Against Caldwell, Hayes and Allison

As a public employee, Bailey possessed a property right in his continued employment with ACDC. *See, e.g., Board of Regents v. Roth*, 408 U.S. 564, 576-78, 92 S.Ct. 2701, 2708-10, 33 L.Ed.2d 548 (1972). Indeed, this question does not seem to have been disputed below. What is disputed is whether Bailey was deprived of that property right without due process of law—that is, what process was Bailey due and what did he receive? In answering that question, we note that neither the personnel policies of Alachua County nor the state law of Florida provides the answer. Rather, federal constitutional standards determine what process Bailey was due. *Cleveland Board of Educ. v. Loudermill*, 470 U.S. 532, 541, 105 S.Ct. 1487, 1492, 84 L.Ed.2d 494 (1985); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432, 102 S.Ct. 1148, 1155, 71 L.Ed.2d 265 (1982). Bailey challenges several issues related to his suspension without pay from ACDC. First, the district court initially granted Allison, Caldwell, Hayes and Alachua County summary judgment as to Bailey's "initial suspension" without pay in its July or-

der. Confusion has reigned since. Bailey argues that by "initial suspension," the district court meant Allison's May 14th letter. Thus, according to Bailey, the court left open a window of potential liability beginning on May 26th when Allison wrote Bailey a second letter suspending him without pay. Bailey, however, argues that the district court erred in not leaving this window open as of May 14. Caldwell, Hayes and Alachua County argue that the district court's "initial suspension" freed them from liability up to the point at which Bailey's criminal charges were dropped and he requested reinstatement and a hearing (November 19, 1987).[11] Although the parties participated in a lengthy argument on this point in chambers, the district court did not resolve the dispute at that time or thereafter. *See* Tr. 20-569-3 to 11. Caldwell and Hayes also assert that perhaps their window of liability opened as late as February 13, 1988. On that date Allison left ACDC: since the district court had granted summary judgment to Allison on the procedural due process claims because "he was already gone," Caldwell and Hayes reason that they, too, must be free from liability for this period because it was Allison who actually wrote all three letters to Bailey.

Fortunately, we need not affix dates to Bailey's procedural due process claims to resolve this confused issue. Rather, as developed below, we separate Bailey's procedural due process claim into two strands: (1) his claim that he was deprived of due process when he was suspended without pay at the time of his arrest on May 14, 1987 without notice or an opportunity for a hearing (the "predeprivation procedural due process claim"), and (2) his claim that he was deprived of due process when ACDC continued his suspension without pay after May 14, 1987 without notice and an opportunity for a hear-

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[11] Caldwell and Hayes, in their cross appeal, argue that they were entitled to qualified immunity as to Bailey's entire procedural due process claim. We address this argument in part III(B)(1)(b) below.

ing (the "postdeprivation procedural due process claim"). The district court stated in its July order that "they [Allison, Caldwell and Hayes] reasonably believed that Bailey's suspension without pay without a predeprivation hearing was lawful, considering the seriousness of the charges against him." R. 388. The district court then granted qualified immunity to Allison, Caldwell, and Hayes for Bailey's initial suspension. We think that the proper interpretation of the district court's ruling is that Bailey had not carried his burden of demonstrating that the law was clearly established that he had a constitutional right to a predeprivation hearing before being suspended. To defeat a qualified immunity defense, Bailey was required to show that the defendants violated a clearly established statutory or constitutional right of which a reasonable person would have known. *Mitchell v. Forsyth*, 472 U.S. 511, 528, 105 S.Ct. 2806, 2816, 86 L.Ed.2d 411 (1985); *see also Rich v. Dollar*, 841 F.2d 1558, 1563-64 (11th Cir.1988) (explaining shifting burdens of proof once defendant raises affirmative defense of qualified immunity). In deciding whether a constitutional right is clearly etsablished, we must judge the contours of the law at the time the employment decision was being made, irrespective of subsequent developments in the law. Thus, public officials are charged with keeping abreast of the current state of the law, not with anticipating changes. Whether the law is "clearly established" is a quesion of law that we review *de novo*. *Courson v. McMillian*, 939 F.2d 1479, 1487 (11th Cir. 1991). We agree with the district court that Bailey did not carry his burden of establishing that he had a clearly established constitutional right to a predeprivation hearing.

In *Parratt v. Taylor*, 451 U.S. 527, 539-40, 101 S.Ct. 1908, 1914-15, 68 L.Ed.2d 420 (1981), *overruled in part on other grounds, Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986), the Supreme Court stated that the requirement of a hearing does not always require the state to provide a hearing *prior* to the

initial deprivation. "[T]he necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking, can satisfy the requirements of procedural due process." *Id.* 451 U.S. at 539, 101 S.Ct. at 1915. After noting that the "fundamental requirement of due process is the opportunity to be heard and it is an 'opportunity which must be granted at a meaningful time and in a meaningful manner,' " the Court confirmed that it had "rejected the proposition that 'at a meaningful time and in a meaningful manner' *always* requires the State to provide a hearing prior to the initial deprivation of property." *Id.* at 540, 101 S.Ct. at 1915 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965)); *see also Cleveland Board of Educ. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985) (delay of nine months in providing postdeprivation hearing not constitutionally infirm).[12]

In applying this flexible legal standard regarding predeprivation due process to the facts of this case, we con-

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[12] The flexibility in the constitutional requirements pertaining to a predeprivation hearing derives from the balancing approach first enunciated in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976). The need for some form of predeprivation hearing is determined from balancing the competing interests at stake. "These are the private interests in retaining employment, the governmental interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of an erroneous termination." *Loudermill*, 470 U.S. at 542-43, 105 S.Ct. at 1493-94 (citing *Mathews*, 424 U.S. at 335, 96 S.Ct. at 903). Thus, while we agree with Bailey that in the usual case notice and an opportunity to be heard before being deprived of a property interest reflects standard due process requirements, Bailey did not succeed in demonstrating that the particular circumstances of his case made it unreasonable for Caldwell, Hayes and Allison to believe that it was lawful to forego a hearing prior to May 14 when Bailey was arrested and suspended.

clude that Bailey did not establish that Caldwell, Hayes and Allison reasonably would have known their action in initially suspending him without pay upon his arrest was unlawful. A corrections facility's paramount concern is security; a guard suspected of corruption compromises that security. Therefore, the defendants could have reasonably believed that this was a situation with a "necessity for quick action" that made a predeprivation hearing impracticable. Furthermore, the defendants were all aware that Alachua County's personnel regulations provided an appeal procedure for employees to contest disciplinary action taken against them. It would have been reasonable for the defendants to believe that these procedures were capable of providing Bailey an adequate postdeprivation remedy. Thus, we agree with the district court's ruling that Caldwell, Hayes and Allison are entitled to qualified immunity with respect to Bailey's procedural due process claims regarding his right to a predeprivation hearing.[13]

The district court correctly allowed Bailey's postdeprivation procedural due process claim to remain viable, however, and it ultimately went to the jury against Caldwell, Hayes and Alachua County. It should also have gone to the jury against Allison. Section 1983 requires proof of an affirmative causal connection between the official act or omission complained of and the alleged con-

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[13] Although Bailey argues that he could have been suspended with pay from the beginning, we do not think that he carried his burden of establishing that the contours of that right were clearly established at the time in question. His only source of this option is one sentence of dicta in *Loudermill:* "[I]n those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay." *Loudermill*, 470 U.S. at 544-45, 105 S.Ct. at 1494-95. While we agree that the problem of a post-deprivation remedy may be avoided by suspending with pay, for then there is not a deprivation, we do not think that by pointing to one sentence Bailey carried his burden of showing that suspension with pay in the circumstances of this case was required by clearly established law.

stitutional deprivation. *See Williams v. Bennett*, 689 F.2d 1370, 1380-81 (11th Cir.1982), *cert. denied*, 464 U.S. 932, 104 S.Ct. 335, 78 L.Ed.2d 305 (1983). Allison did not leave his employment with ACDC until February 13, 1988; all three letters from Allison to Bailey regarding his suspension [14] were sent before that time (May 14, May 26 and December 7, 1987). At trial, Allison testified that he consulted with Caldwell and Hayes and received their approval for the action he took against Bailey on May 14. Tr. 28-562-1172 to 174. Although Hayes, who was Alachua County's Personnel Director, denied the degree of consultation that Allison attributed to her, *see* Tr. 29-563-91, 92, as did Caldwell, *see* Tr. 29-563-116, 117, Bailey established sufficient evidence to warrant jury consideration of Caldwell and Hayes' personal involvement. For instance, Hayes testified that "[i]t would be my responsibility to ensure that these [lengthy suspensions without pay] situations don't happen." Tr. 29-563-69.[15] And Caldwell testified that he was the person "in charge of the administrative action taken against the Department of Corrections personnel." Tr. 29-563-122, 123. We conclude that Bailey presented sufficient evidence so that a reasonable jury could find the requisite causal connection between the acts or omissions of each of the three defendants and his alleged deprivation with respect to his employment with ACDC. The jury is the appropriate body to resolve any factual conflicts in the

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[14] We note that although various defendants have argued at various points that the wording "leave without pay" (December 7 letter) as opposed to "suspension without pay" (May letters) is significant, we disagree. In the face of uncontroverted evidence that no hearing or other administrative proceeding was held to determine Bailey's status, this semantic difference is insignificant for our purposes. Indeed, Bailey's status with ACDC was still uncertain at the time of trial. *See, e.g.*, Tr. 29-563-122 (testimony of Caldwell).

[15] Hayes also testified that as of May 1987 she was aware of court precedent on "giving the employee a hearing to air his side of or his position when he was subjected to disciplinary proceedings or suspension proceedings." Tr. 29-563-68, 69.

evidence and to make credibility determinations where applicable. There is nothing in the record to support a principled legal distinction between Allison, Caldwell and Hayes in regard to Bailey's postdeprivation procedural due process claims. Allison should have gone to the jury along with Caldwell and Hayes on Bailey's postdeprivation procedural due process claims; he was not entitled to summary judgment because he was "already gone" as the district court held.

b. Alachua County

Bailey also argues that Alachua County should be held liable on his procedural due process and name-clearing hearing claims and that the district court erred by refusing to grant either his motion for directed verdict or his motion for judgment notwithstanding the verdict as to Alachua County. Our standard of review on this issue is the same as discussed above in reference to a directed verdict motion. *See supra* part III(A)(1). We find firm support for the jury's verdict for Alachua County in the record. A local government cannot be held liable for its employees' acts under § 1983 on a theory of respondeat superior; the liability must be founded on an official policy or custom. *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 691, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978). An isolated decision by a municipal employee constitutes official policy only if that employee has "final policymaking authority" for the challenged act under state law. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123, 108 S.Ct. 915, 924, 99 L.Ed.2d 107 (1988). In this case, the record is devoid of evidence that either Caldwell, Hayes or Allison had "final policymaking authority" for Alachua County's personnel policy. Testimony at trial was unequivocal that final policymaking authority rested in the Board of County Commissioners. Furthermore, the record is also devoid of evidence that Alachua County had any official policy or

custom to deny Bailey any name-clearing hearing to which he may have been entitled. On the record before us, no reasonable jury could have found liability on the part of Alachua County for Bailey's procedural due process or name-clearing hearing claims. Thus, we affirm the district court's final judgment dismissing all of Bailey's claims against Alachua County.

In summary, as to Bailey's appeal we affirm all of the district court's judgments except for the dismissal of Allison from this litigation through summary judgment. Furthermore, we have clarified that the viable procedural due process claims remaining against Caldwell, Hayes and Allison are postdeprivation claims; the district court properly granted these three defendants qualified immunity as to Bailey's predeprivation procedural due process claims.

B. Caldwell & Hayes' Appeal

Caldwell and Hayes mount a two-pronged attack. First, they argue that they were entitled to qualified immunity on Bailey's procedural due process and name-clearing hearing claims and accordingly assert that the district court erred in not granting either their motions for summary judgment, their motions for directed verdict or their motions for JNOV. Second, they argue that several errors in the conduct of the trial warrant reversal of the jury's verdict. We discuss these two prongs of their argument below.

1. *Qualified Immunity*

a. Name Clearing Hearing.

Caldwell and Hayes argue that the district court erred in denying them qualified immunity with respect to Bailey's claim that they deprived him of a constitutionally protected liberty interest by not providing him a name-clearing for alleged stigmatizing information contained in his personnel file. In its omnibus July order, the dis-

trict court denied Caldwell and Hayes qualified immunity on this issue, subjecting them to liability on this claim from May 1, 1989 forward. Tr. 14-388-12. The court highlighted May 1, 1989 because of this Circuit's decision on that date in *Buxton v. City of Plant City, Fla.*, 871 F.2d 1037 (11th Cir.1989). The district court reasoned that the law became "clearly established" on that date; thus, Caldwell and Hayes were not entitled to summary judgment on the basis of qualified immunity. Whether the law is clearly established is a question of law we review *de novo*. *Moore v. Morgan*, 922 F.2d 1553, 1556 (11th Cir.1991). We agree with Caldwell and Hayes that the district court erred in denying them qualified immunity on this claim; they were entitled to qualified immunity as a matter of law on this issue.

In deciding whether the law is clearly established, we ask whether the legal contours of the right at issue are clear and specific enough for a reasonable official to have known that her actions were unlawful. *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987); *Courson v. McMillian*, 939 F.2d 1479, 1488 (11th Cir.1991). *Buxton* explicitly stated that it faced an issue of first impression in this Circuit in deciding whether placing stigmatizing information in the personnel file of a public employee constitutes publication sufficient to trigger the employee's right to procedural due process. *Buxton*, 871 F.2d at 1042. Thus, prior to *Buxton*, it was not clearly established that Bailey was entitled to a name-clearing hearing regarding alleged stigmatizing information in his personnel file. To hold Caldwell and Hayes accountable to Bailey for decisions rendered during the pendency of Bailey's litigation is to hold them to too stringent a standard. Caldwell and Hayes filed motions to dismiss this claim on the basis of qualified immunity on March 21, 1989, well before *Buxton* was decided. *See* R. 141. Caldwell and Hayes

are entitled to qualified immunity with respect to Bailey's name-clearing hearing claims; that issue should not have gone to the jury.[16]

b. Procedural Due Process Claim

Caldwell and Hayes also argue that they were entitled to qualified immunity with respect to Bailey's procedural due process claims. As noted above, the district court granted Caldwell and Hayes qualified immunity with respect to Bailey's "initial" suspension. We have concluded that this is best seen as granting Caldwell and Hayes qualified immunity for Bailey's predeprivation claim, and we uphold that decision. Caldwell and Hayes also argue that they are entitled to qualified immunity with respect to Bailey's postdeprivation claim. As noted earlier, here they ask too much. Although the district court did not explicitly rule on Caldwell and Hayes' qualified immunity defense, we interpret the district court's actions as rejecting that defense.[17] Furthermore, we agree that Cald-

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[16] Because we hold that Caldwell and Hayes qualifiedly immune as to Bailey's name-clearing hearing claim, we do not address the balance of their arguments on this claim such as whether any information in Bailey's file was "false."

[17] Caldwell and Hayes first assert that the district court erred in not explicitly ruling on whether they were entitled to qualified immunity, and then, by refusing to submit the issue of qualified immunity to the jury. This argument is contrary to the law in this circuit. *See Ansley v. Heinrich*, 925 F.2d 1339, 1348 (11th Cir.1991) (qualified immunity is an affirmative defense from trial and not a defense to liability issues raised during trial, thus once it is denied pretrial, the jury should determine the factual issues without any mention of qualified immunity); *see also Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815, 86 L.Ed.2d 411 (1985) (qualified immunity is in essence an immunity from suit). We recognize, as did the panel in *Ansley*, that there is a split of authority in the circuits as to whether qualified immunity from damages may be asserted at trial and is properly included in jury instructions. *See Ansley*, 925 F.2d at 1345-48.

well and Hayes are not entitled to qualified immunity for Bailey's postdeprivation procedural due process claims.

Unlike his efforts regarding his predeprivation due process claim, Bailey has shown that the law was clearly established that he was due some "meaningful" process within a "meaningful" time. *See supra* part III(A)(3). Moreover, Bailey has shown a substantial conflict in the evidence that prohibits us from deciding whether Bailey received less process than he was due as a matter of law. At trial Caldwell, Hayes and Allison testified that they did not give Bailey notice of his appeal rights. The personnel procedures applicable to ACDC employees require that an employee receive notice of his appeal rights when disciplinary action is taken against him. Caldwell and Hayes attempted to deflect their technical noncompliance by arguing that Bailey had used the appeal procedure before and was already aware of it, thus obviating the need for them to provide him notice or at least making their failure to provide him notice harmless. The only evidence introduced by Caldwell and Hayes on this point, however, was letters from Bailey regarding some overtime pay he believed he had been shorted. *See* Plaintiffs Exhibit 201. Neither Bailey's handwritten letter regarding this overtime pay nor a typewritten letter that a secretary at ACDC had done for Bailey mention the appeal process to which Caldwell and Hayes referred. *See id.* Therefore, a jury could have reastonably resolved this fact-bound notice issue in Bailey's favor.

Furthermore, Caldwell and Hayes both asserted at trial that Bailey was not entitled to a hearing from ACDC until his criminal charges were dropped and that they would not have provided him with one had he made a request. Caldwell and Hayes' argument is that a hearing would have been futile while criminal charges were pending against Bailey, thus excusing them (at least up to that point) from not providing him with a hearing regarding

his employment with ACDC.[18] Their argument tries to prove too much: "The right to a hearing does not depend on a demonstration of certain success." *Cleveland Board of Educ. v. Loudermill*, 470 U.S. 532, 544, 105 S.Ct. 1487, 1494, 84 L.Ed.2d 494 (1985) (citing *Carey v. Piphus*, 435 U.S. 247, 266, 98 S.Ct. 1042, 1053, 55 L.Ed.2d 252 (1978)). Perhaps Bailey could have convinced ACDC to suspend him with pay or to place him in a non-security position during the pendency of the criminal action against him; perhaps Bailey would not have even appeared at his hearing. Simply put, the answers to these questions are irrelevant. Moreover, it is inconsistent for Caldwell and Hayes to argue both that the personnel regulations provided Bailey all the process he was due and in the same breath admit that they would not have given Bailey a hearing (or that he was not entitled to one) until his criminal charges were dropped. A jury is entitled to resolve this inconsistency as it sees fit. Moreover, Bailey did request a hearing—the day after he learned that his criminal charges had been dropped, which makes his request extremely timely if measured from the point at which Caldwell and Hayes testify the measurement should start. These are examples of factual disputes concerning Bailey's procedural due process claim that prohibit us from rendering a decision on this claim as a matter of law. These issues may be addressed more succinctly upon remand for a new trial against Caldwell, Hayes and Allison on Bailey's postdeprivation procedural due process claims. We have already concluded that Allison should have been a defendant in Bailey's postdeprivation due process claim and that Bailey's name-clearing hearing should not have gone to the jury. As discussed below, we also find that significant prejudicial errors were committed during the trial, requiring reversal of the jury's verdict for Bailey against Caldwell and Hayes.

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[18] Moreover, although closely factually related, the criminal process against Bailey would not have automatically resolved his employment rights with Alachua County.

2. *Trial Errors*

a. Motion to Sever

The first ruling that Caldwell and Hayes attack is the district court's refusal to sever the employment-related due process issues from the earlier false arrest, false imprisonment and conspiracy issues. They argue that a district court may order separate trials of any claims or issues "in furtherance of convenience or to avoid prejudice, or when separate trial will be conducive to expedition and economy." Fed.R.Civ.P. 42(b). Furthermore, Rule 21 provides that "any claim against a party may be severed and proceeded with separately." Fed.R.Civ.P. 21. We will not disturb a district court's decision not to order separate trials absent an abuse of discretion. *T.D.S. Inc. v. Shelby Mut. Ins. Co.*, 760 F.2d 1520, 1535 (11th Cir. 1985), *modified on other grounds*, 769 F.2d 1485 (11th Cir.1985). Although our review of the record in this case does not enable us to conclude that the district court's severance denial alone was an abuse of discretion warranting reversal of the jury's verdict, we do find that this issue raises substantial doubt and question that further reinforces our decision to reverse the jury verdict on the basis of the other errors we discern. We now turn to those errors.

b. Juror Johns

Caldwell and Hayes argue that the district court abused its discretion by refusing to exclude a juror (Johns) from the panel. The district court denied their counsel's request that Johns be stricken from the jury panel for cause (no preemptory challenges remained). Tr. 20-569-117 to 119. Our question on appeal is whether there is fair support in the record for the district court's conclusion that the juror would be impartial. *Patton v. Yount*, 467 U.S. 1025, 1038, 104 S.Ct. 2885, 2892, 81 L.Ed.2d 847 (1984). We conclude that the required support is missing in this case. At the time of trial, Johns had been employed at

Shands Hospital for ten years in the psychiatric unit and was working as an administrative assistant to the Senior Director of Nursing. Tr. 20-569-50, 51, 67, 68. Before the trial, Johns knew both Bailey and Dr. Waldman, Bailey's treating psychiatrist and a witness in the case. Shands hospital is not only the institution at which Bailey was treated and in which Bailey was hospitalized for over a month, it was also his employer at the time of trial. Tr. 20-569-50 to 52. Thus, Johns was a coworker of Bailey's and of Dr. Waldman's. Johns testified that she knew many of the potential witnesses through her employment. Tr. 20-569-106, 107.

Johns' relationship to Bailey and to Dr. Waldman raised substantial doubts about her ability to serve as a juror fairly and impartially. What is more, the colloquy between Johns and the court did not dispel these doubts. "Doubts about the existence of actual bias should be resolved against permitting the juror to serve, unless the prospective panelist's protestation of a purge of preconception is positive, not pallid." *United States v. Nell*, 526 F.2d 1223, 1230 (5th Cir.1976).[19] The record in this case leaves juror Johns' impartiality in question. The record reveals that the district court interrupted Johns before letting her finish her response to questions about her knowledge of Bailey and his mental condition, leaving that issue inadequately explored.[20] Furthermore, Johns

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[19] In *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit rendered prior to October 1, 1981.

[20] One relevant portion of Johns discussion with the district court is as follows:

> THE COURT: [Anything about your knowledge of] Mr. Bailey that would, in any way, tend to influence your verdict in this case?
>
> MS. JOHNS: I don't feel so at all but—

responses to whether her connections to Bailey would make any difference to her ability to serve as an impartial juror were hesitant and equivocal.[21] Because Bailey's mental condition was a key issue at trial, and because the record discloses that Johns herself was uncertain about her ability to be impartial, we agree with Caldwell and Hayes that the district court abused its discretion in refusing to exclude Johns for cause. *See Depree v. Thomas*, 946 F.2d 784, 790 n. 11 (11th Cir.1991) (distinguishing between potential bias that further investigation eliminates

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THE COURT: Could you tell us how you know him through acquaintanceship at the hospital?

MS. JOHNS: That's awkward for me because at least my awareness of him has to do with a confidentiality issue at the hospital.

THE COURT: Does it have to do with any of his physical or mental condition?

MS. JOHNS: Yes, sir . . . .

THE COURT: [Y]ou have become aware of certain facts about Mr. Bailey or certain conditions, either emotional or mental that he may have or what?

MS. JOHNS: Only in the very broadest of sense. I do work with inpatient units, so I don't know anything in particular about him. I just know that he has been—

Tr. 20-569-51, 52.

[21] Johns' uncertainty is revealed in the following excerpt of her sidebar conference with the district court:

THE COURT: [Bailey] was a patient?

MS. JOHNS: He also is an employee at Shands. I've seen him as an employee.

. . . . . .

THE COURT: Would any of [this] make any difference to you sitting on the jury?

MS. JOHNS: I don't believe so but I'm not quite sure. I'm not the one to make that decision.

THE COURT: We wanted to know what you know about him.

MS. JOHNS: I have no personal connection at all.

THE COURT: Cause is denied. . . .

Tr. 20-569-119.

and potential bias that is either not adequately explored or not adequately eliminated by further investigation). In sum, we do not find fair support in the record for the district court's conclusion that juror Johns would be impartial.

c. Jury Instructions on Damages

Caldwell and Hayes contend that the district court abused its discretion in refusing to submit Caldwell and Hayes' requested instruction on damages to the jury. They argue that the district court's jury instruction on damages was prejudicial and misleading because it failed to separate the damages attributable to claims involving false arrest and imprisonment from the damages attributable solely to Bailey's procedural due process claims. We agree. Caldwell and Hayes asked the Court to instruct the jury that it could not award damages against them that were caused by the arrest, imprisonment or prosecution of Bailey. Instead, the court instructed the jury, *inter alia*, that "you should assess the amount you find to be justified by the preponderance of the evidence as full, just and reasonable compensation for all of the plaintiffs' [sic] damages." Tr. 42-578-17.

Judge Fay has recently explained this Court's approach in addressing a challenge to a denied jury instruction:

> On appeal, we examine whether the jury charges, considered as a whole, sufficiently instructed the jury so that the jurors understood the issues and were not misled. The trial judge's refusal to give a requested instruction is not error where the substance of that proposed instruction was covered by another instruction that was given. If a requested instruction is refused and is not adequately covered by another instruction, the court will first inquire as to whether the requested instruction is a correct statement of the law. In such a scenario, if the requested instruction does accurately reflect the law, the next

> step is to assess whether the instruction addresses an issue that is properly before the jury. Even if both of these criteria are met, there must still be a showing of prejudicial harm that resulted from the failure of the trial court to give the requested instruction before the judgment will be disturbed on that ground.

Wilkinson v. Carnival Cruise Lines, Inc., 920 F.2d 1560, 1569 (11th Cir.1991) (citations omitted).

Applying this step-by-step analysis to the facts of this case, we conclude that the district court's refusal of Caldwell and Hayes' requested jury instruction was prejudicial error. First, the substance of Caldwell and Hayes' requested instruction was not covered by another instruction nor by the balance of the instructions as a whole. For five weeks the jury heard testimony regarding not only Bailey's alleged damages from a procedural due process violation, but also regarding his alleged damages from his arrest-related claims. This was because those claims were viable until the district court directed verdicts on them at the close of all testimony. On the eve of jury deliberations, the class of defendants suddenly decreased from ten to three. After that, any damage flowing from Bailey's lawful arrest was not compensable. Realizing that the jury had heard testimony regarding all of Bailey's damages, Caldwell and Hayes requested instruction endeavored to focus the jury on damages attributable to them.[22] Moreover, their requested instruction accur-

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[22] Although Caldwell and Hayes argue that Bailey did not prove that he was damaged by their alleged procedural due process violation, the record reveals that Bailey adequately proved damages. Medical experts for both sides testified that Bailey's mental condition was the result of the arrest, his suspension, and all events that followed. *See, e.g.*, Tr. 30-564-20; Tr. 23-571-113, 189, 190. Thus, we reject Caldwell and Hayes argument that Bailey did not prove that the alleged procedural due process violations were a cause of his mental deterioration. There is ample support in the record to conclude that a reasonable jury could have found that the claimed

ately reflected the law. Only those damages actually resulting from a procedural due process deficiency may be compensated. *Carey v. Piphus*, 435 U.S. 247, 264, 98 S.Ct. 1042, 1052, 55 L.Ed.2d 252 (1978). Continuing Judge Fay's suggested analysis, the issue of Bailey's mental and physical damages was properly before the jury. Furthermore, the district court's refusal to give Caldwell and Hayes' requested instruction allowed the jury to consider all of the damages testimony they had heard throughout five weeks of trial. No instruction could have taken away all the testimony the jury heard regarding Bailey's conspiracy and false arrest claims. However, an instruction such as the one Caldwell and Hayes requested could have explicitly cautioned the jury that it should not consider damages attributable to the lawful arrest. The district judge's refusal of this instruction, combined with the failure of the instructions as a whole to specify the damages the jury could properly consider, prejudiced Caldwell and Hayes.[23]

In summary, as to Caldwell and Hayes' appeal, we find that the aggregate effect of several errors warrants reversal of the jury's verdict against Caldwell and Hayes: the district court's refusal to exclude juror Johns, its refusal of Caldwell and Hayes' requested damage instruction, its error in submitting Bailey's name-clearing hearing claim to the jury, and the substantial doubt and question raised by its refusal to sever the procedural due process claims from the other claims. We also find that the district court correctly denied Caldwell and Hayes qualified immunity with respect to Bailey's post-deprivation procedural due process claims. Thus, a new trial is necessary.[24]

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procedural due process violations were a significant cause of Bailey's physical and mental damages.

[23] Caldwell and Hayes unsuccessfully objected to the damage instructions given. Tr. 42-577-70.

[24] While we have considered the possibility of remanding solely on the issue of damages, this would not be appropriate for several

IV.

Accordingly, we AFFIRM the district court's elimination of all defendants except for Caldwell, Hayes and Allison. We REVERSE the district court's summary judgment for Allison on Bailey's procedural due process claim. We REVERSE the jury's verdict for Caldwell and Hayes, and REMAND for a new trial against Caldwell, Hayes and Allison on Bailey's postdeprivation procedural due proces claims. We AFFIRM the jury's verdict in favor of Alachua County. The elimination of the majority of original defendants and claims will lead to a much simpler and straightforward trial on remand. All that remains for the new trial is Bailey's postdeprivation procedural due process claim against Allison, Caldwell and Hayes. Bailey's motion for fees pursuant to 42 U.S.C. § 1988 is moot at this time.

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reasons. Foremost, we cannot say that the prejudicial jury instructions on damages, combined with the presence of juror Johns, who we have decided should have been excluded for cause, affected only the jury's assessment of damages against Caldwell and Hayes. Furthermore, we have also decided that Allison should have gone to the jury as well as Caldwell and Hayes and have noted considerable confusion throughout this trial on the procedural due process claims and the window of liability that was open against the defendants. We have also determined that the name clearing hearing issue should not have gone to the jury and have expressed doubts regarding the decision to not sever the due process claims from the dramatic claims regarding Bailey's lawful arrest. Thus, the cumulative effect of these problems is substantial enough to warrant a new trial for Caldwell, Hayes and Allison on the issue of Bailey's postdeprivation procedural due process claims. We note that Alachua County was not affected by the confusing damage instructions because the jury did not find the county liable on any of Bailey's claims. Our exhaustive review of the record in this case supports the jury's verdict that Bailey made no evidentiary showing on which a jury could reasonably find Alachua County liable.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

Case No. GCA 88-10198-MMP

GREGG FITZGERALD BAILEY and
LIZZIE SHIRLEY BAILEY,
Plaintiffs,

v.

BOARD OF COUNTY COMMISSIONERS OF
ALACHUA COUNTY, FLORIDA, *et al.*,
Defendants.

ORDER

[Filed Mar. 4, 1991]

This cause is before the court on various outstanding motions. Plaintiff's motion for Judgment Notwithstanding the Verdict (Doc. 482) is DENIED; Defendant Caldwell's renewed motion for Directed Verdict, Judgment Notwithstanding the Verdict, and for a New Trial (Doc. 485), is DENIED; Defendant Hayes' renewed motion for Directed Verdict, Judgment Notwithstanding the Verdict, and for a New Trial (Doc. 487) is DENIED. The following motions will be ruled on by separate order:

1) City's motion for attorneys' fees (Doc. 505).

2) City's motion for costs (Doc. 506).

3) Plaintiffs' motion to strike City's motion for costs (Doc. 521).

4) County's motion to tax costs (Doc. 523).

5) Joinder of defendants' Garrahan, Brown, Strauss and Allison in County's motion to tax costs (Doc. 522).

6) Motion to tax costs by defendants Hindery and Cole (Doc. 524).

7) Defendant Tileston's motion for costs (Doc. 527).

8) Plaintiffs' motion to strike Tileston's motion for costs (Doc. 543).

9) City's motion to require plaintiffs to post bond (Doc. 545).

DONE AND ORDERED this 1st day of March, 1991.

/s/ Maurice M. Paul
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

Case No. GCA 88-10198-MMP

GREGG FITZGERALD BAILEY and LIZZIE SHIRLEY BAILEY,
Plaintiffs,

vs.

ALACHUA COUNTY, L.J. "LU" HINDERY AS SHERIFF OF ALACHUA COUNTY, FLORIDA; CITY OF GAINESVILLE, FLORIDA; JOHN STANTON TILESTON, SR.; JAMES STRAUSS; FARNELL COLE; GARY BROWN; TOM L. ALLISON; NATE CALDWELL; STEPHEN A. GARRAHAN; and COLLEEN HAYES,
Defendants.

FINAL JUDGMENT

[Filed Aug. 30, 1990]

THIS ACTION was tried before the Court and Jury. The Court reserved ruling on a motion for directed verdict made by Defendant CITY OF GAINESVILLE, FLORIDA ("City") at the close of the Plaintiff's case. The City renewed its motion for directed verdict at the close of all of the evidence. On the evidence presented the Court granted the City's motion for directed verdict. Accordingly,

IT IS ADJUDGED

1. That all claims, actions, and causes of action by the Plaintiff against the City are dismissed with prejudice to the Plaintiff.

2. That the Plaintiff GREGG F. BAILEY take nothing by this action from the Defendant CITY OF GAINESVILLE, FLORIDA, and the City go hence without day.

3. That the City shall recover its costs from the Plaintiff GREGG F. BAILEY in an amount to be set by the Court upon the filing of a motion to tax costs by the City.

DONE and ORDERED in Chambers, at Tallahassee, Florida, this 30th day of August, 1990.

/s/ Maurice M. Paul
District Court Judge

COPIES FURNISHED TO:

All Counsel of record

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

Case No. 88-10198-MMP

GREGG FITZGERALD BAILEY and SHIRLEY BAILEY,
Plaintiffs,

vs.

BOARD OF COUNTY COMMISSIONERS OF ALACHUA COUNTY, FLORIDA; CITY OF GAINESVILLE, FLORIDA; JOHN STANTON TILESTON, SR.; JAMES STRAUSS; FARNELL COLE; GARY BROWN; TOM L. ALLISON; NATE CALDWELL; STEPHEN A. GARRAHAN, and COLLEEN HAYES,
Defendants.

FINAL JUDGMENT FOR DEFENDANT ALACHUA COUNTY

[Filed Aug. 30, 1990]

THIS ACTION was tried before the Court and Jury. The Court reserved ruling on a motion for directed verdict made by Defendant Alachua County (County), at the close of Plaintiff's case. The County renewed its motion for directed verdict at the close of all the evidence. On the evidence presented, the Court granted the County's motion for directed verdict on all issues except Plaintiff's claim of denial of procedural due process as it relates to his employment and the issue of failure to provide him a name-clearing hearing, which issue was submitted to the jury. The jury returned a verdict in favor of the County; accordingly,

IT IS ADJUDGED:

1. That all claims, actions, and causes of action by the Plaintiff against Alachua County are dismissed with prejudice to the Plaintiff.

2. That the Plaintiff, Gregg F. Bailey, take nothing by the action from the defendant, Alachua County, Florida, and the County go hence without day.

3. That the County shall recover its costs from the Plaintiff, Gregg F. Bailey, in an amount to be set by the Court upon the filing of a motion to tax costs by the County.

DONE AND ORDERED in Chambers at Tallhassee, Florida, this 30th day of August, 1990.

/s/ Maurice M. Paul
District Court Judge

Copies furnished to:

ALL COUNSEL OF RECORD

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

Case No. GCA-88-10198-MMP

GREGG FITZGERALD BAILEY and LIZZIE SHIRLEY BAILEY,
Plaintiffs,

vs.

BOARD OF COUNTY COMMISSIONERS OF ALACHUA COUNTY, FLORIDA; L.J. "LU" HINDERY, Sheriff of Alachua County, Florida; the CITY OF GAINESVILLE, FLORIDA; JOHN STANTON TILESTON, SR.; JAMES STRAUSS; FARNELL COLE; GARY BROWN; TOM L. ALLISON; NATE CALDWELL; STEPHEN A. GARRAHAN and COLLEEN HAYES,

Defendants.

FINAL JUDGMENT FOR DEFENDANTS STRAUSS & GARRAHAN

[Filed Aug. 30, 1990]

This action having been tried before the Court and a jury and the Court having granted Defendants Strauss and Garrahan's motion for directed verdict at the close of all evidence, it is accordingly

ADJUDGED:

1. That all claims, actions and causes of action by plaintiff against James Strauss and Stephen A. Garrahan are dismissed with prejudice.

2. That plaintiff take nothing from James Strauss and Stephen A. Garrahan.

3. That Defendants Strauss and Garrahan shall recover their costs from plaintiff in an amount to be determined by the Court upon the filing of a motion to tax costs.

DONE AND ORDERED in Chambers this 30th day of August, 1990.

/s/ Maurice M. Paul
United States District Judge

Copies to Counsel of Record

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE FLORIDA

Case No. GCA-88-10198-MMP

GREGG FITZGERALD BAILEY and LIZZIE SHIRLEY BAILEY,
Plaintiffs,

vs.

BOARD OF COUNTY COMMISSIONERS OF ALACHUA COUNTY, FLORIDA; L.J. "LU" HINDERY, Sheriff of Alachua County, Florida; the CITY OF GAINESVILLE, FLORIDA; JOHN STANTON TILESTON, SR.; JAMES STRAUSS; FARNELL COLE; GARY BROWN; TOM L. ALLISON; NATE CALDWELL; STEPHEN A. GARRAHAN and COLLEEN HAYES,

Defendants.

FINAL JUDGMENT FOR DEFENDANT GARY BROWN

[Filed Aug. 30, 1990]

This action having been tried before the Court and a jury and the Court having entered summary judgment for Defendant Brown on the issues of the arrest, incarceration and prosecution of the plaintiff and also having entered summary judgment for Defendant Brown on the issue of any stigmatization caused by the arrest, incarceration and prosecution; the court having heard further argument at the close of all the evidence and upon motion of Defendant Brown dismissing the remaining issues against him, accordingly, it is

ADJUDGED:

1. That all claims, actions and causes of action by plaintiff against Gary Brown are dismissed with prejudice.

2. That plaintiff take nothing from Gary Brown.

3. That Defendant Brown shall recover his costs from plaintiff in an amount to be determined by the Court upon the filing of a motion to tax costs.

DONE AND ORDERED in Chambers this 30th day of August, 1990.

/s/ Maurice M. Paul
United States District Judge

Copies to Counsel of Record

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

Case No.: GCA 88-10198-MMP

GREGG FITZGERALD BAILEY and LIZZIE SHIRLEY BAILEY,
Plaintiffs,

vs.

ALACHUA COUNTY, L.J. "LU" HINDERY AS SHERIFF OF ALACHUA COUNTY, FLORIDA; CITY OF GAINESVILLE, FLORIDA; JOHN STANTON TILESTON, SR.; JAMES STRAUSS; FARNELL COLE; GARY BROWN; TOM L. ALLISON; NATE CALDWELL; STEPHEN A. GARRAHAN; and COLLEEN HAYES,
Defendants.

FINAL JUDGMENT FOR DEFENDANT HINDERY

[Filed Aug. 30, 1990]

THIS ACTION was tried before the Court and Jury. The Court reserved ruling on a motion for directed verdict made by Defendant Hindery at the close of the Plaintiff's case. Defendant Hindery renewed his motion for directed verdict at the close of all of the evidence. On the evidence presented, the Court granted Defendant Hindery's motion for directed verdict. Accordingly,

IT IS ADJUDGED,

1. That all claims, actions, and causes of action by the Plaintiff against Defendant Hindery are dismissed with prejudice to the Plaintiff.

2. That the Plaintiff Gregg F. Bailey take nothing by this action from Defendant Hindery, and Defendant Hindery go hence without day.

3. That Defendant Hindery shall recover its costs from the Plaintiff Gregg F. Bailey in an amount to be set by the Court upon the filing of a motion to tax costs by Defendant Hindery.

4. That the Court will consider Defendant Hindery's entitlement to attorney's fees from the Plaintiff as a prevailing party pursuant to 42 U.S.C. § 1988 upon the filing of a motion by Defendant Hindery.

DONE and ORDERED in Chambers, at Tallahassee, Florida, this 30th day of August, 1990.

/s/ Maurice M. Paul
United States District Judge

Copies to:

All Counsel of Record

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

Case No. GCA-88-10198-MMP

GREGG FITZGERALD BAILEY and LIZZIE SHIRLEY BAILEY,
Plaintiffs,

-vs-

ALACHUA COUNTY, L.J. "LU" HINDERY AS SHERIFF OF ALACHUA COUNTY, FLORIDA; THE CITY OF GAINESVILLE, FLORIDA; JOHN STANTON TILESTON, SR.; JAMES STRAUSS; FARNELL COLE; GARY BROWN; TOM L. ALLISON; NATE CALDWELL; STEPHEN A. GARRAHAN; and COLLEEN HAYES,
Defendants.

FINAL JUDGMENT FOR DEFENDANT JOHN STANTON TILESTON, JR.

[Filed Aug. 30, 1990]

This action was tried before the Court and jury and the Court reserved ruling on the Motion for Directed Verdict of Defendant John Stanton Tileston, Sr. at the close of Plaintiff's case. Defendant Tileston's Motion for Directed Verdict was renewed at the close of all evidence. Having heard argument and, based upon the evidence presented in Plaintiff's and Defendants' case, the Court granted Defendant Tileston's Motion for Directed Verdict. Accordingly, it is

ADJUDGED:

1. That all claims, actions, and causes of action by Plaintiff against John Stanton Tileston, Sr. are dismissed with prejudice.

2. That Plaintiffs take nothing from John Stanton Tileston, Sr.

3. That Defendant Tileston shall recover his costs from Plaintiff in an amount to be determined by the Court upon the filing of motion to tax costs.

DONE AND ORDERED in Chambers, at Gainesville, Florida, this 30th day of August 1990.

/s/ Maurice M. Paul
MAURICE M. PAUL
United States District Judge

Copies to:

Counsel of record

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

Case No. GCA 88-10198-MMP

GREGG FITZGERALD BAILEY and LIZZIE SHIRLEY BAILEY,
Plaintiffs,

v.

ALACHUA COUNTY, *et al.*,
Defendants.

ORDER

[Filed Aug. 30, 1990]

The plaintiff's motion for new trial as to the defendants Hindery, City of Gainesville, Tileston, Strauss, Brown, Caldwell, Garrahan, and Alachua County (Doc. 483) is DENIED as to each defendant.

DONE AND ORDERED this 30th day of August, 1990.

/s/ Maurice M. Paul
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA

GCA: 88-10198-MP

JUDGE MAURICE M. PAUL

GREGG FITZGERALD BAILEY

v.

BOARD OF COUNTY COMMISSIONERS, ALACHUA CO.,
NATE CALDWELL & COLLEEN HAYES

JUDGMENT IN A CIVIL CASE

☒ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED

That the plaintiff, GREGG FITZGERALD BAILEY, recover of the Defendant's NATHANIEL CALDWELL and COLLEEN HAYES, the sum of Two Million, One Hundred Eighty Two Thousand, Four Hundred Six ($2,182,406.00) Dollars with interest thereon at the rate of Seven decimal Eighty Eight (7.88) percent as provided by law, and his costs of action.

MARVIN S. WAITS
Clerk

/s/ Charles R. Cook
CHARLES R. COOK
(By) Deputy Clerk

[Filed Aug. 7, 1990]

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

Case No. GCA 88-10198-MMP

GREGG FITZGERALD BAILEY,
Plaintiff,

v.

BOARD OF COUNTY COMMISSIONERS OF ALACHUA COUNTY, FLORIDA; NATE CALDWELL; and COLLEEN HAYES,
Defendants.

VERDICT

[Filed Aug. 6, 1990]

WE, THE JURY, UNANIMOUSLY RETURN THE FOLLOWING VERDICT:

1. Do you find, by a preponderance of the evidence, that defendant, Alachua County, under color of state law, had a policy that intentionally deprived plaintiff of his property interest in his public employment, without due process of law, as secured to him by the Constitution of the United States?

Yes —— No ✓

2. Do you find, by a preponderance of the evidence, that defendants Nate Caldwell and Colleen Hayes, under color of state law, intentionally deprived plaintiff of his property interest in his public employment, without due process of law, by not granting him hearings to which he was entitled under the Constitution of the United States, and by continuing to deprive him of his job, his back pay and benefits without authority, after all the criminal charges against him had been dismissed?

Nate Caldwell	Yes ✓	No ——
Colleen Hayes	Yes ✓	No ——

3. Do you find, by a preponderance of the evidence, that defendant Alachua County, under color of state law, had a policy that intentionally deprived plaintiff of his liberty interest in his reputation, without due process of law, by continuing to maintain stigmatizing information in plaintiff's personnel files without offering him a hearing to clear his name?

Yes —— No ✓

4. Do you find, by a preponderance of the evidence, that defendants Nate Caldwell and Colleen Hayes, under color of state law, intentionally deprived plaintiff of his liberty interest in his reputation, without due process of law, by continuing to maintain stigmatizing information in plaintiff's personnel files without offering him a hearing to clear his name?

Nate Caldwell	Yes ✓	No ——
Colleen Hayes	Yes ✓	No ——

[If you answered "Yes" to any of the foregoing questions, please answer question 5.]

5. Please set forth, in dollar amount, such damage, if any, you find from a preponderance of the evidence, plaintiff has suffered for:

Lost wages/future earnings	$ 182,406
Mental or emotional distress (both past and future)	$1,300,000
Medical expenses (both past and future)	$ 700,000

SO SAY WE ALL.

Dated this 6th day of August, 1990, in Gainesville, Florida.

/s/ W. M. LANCASTER
Foreperson

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-3590

GREGG FITZGERALD BAILEY, LIZZIE SHIRLEY BAILEY,
Plaintiffs-Appellees,

versus

BOARD OF COUNTY COMMISSIONERS OF ALACHUA COUNTY, FLA., EUGENE T. WHITWORTH, ETC., *et al.*,
Defendants,

JAMES STRAUSS, GARY BROWN, TOM L. ALLISON, NATE CALDWELL, STEPHEN CARRAHAN, COLLEEN HAYES,
Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Florida

[Filed July 9, 1990]

Before TJOFLAT, Chief Judge, ANDERSON and EDMONDSON, Circuit Judges.

BY THE COURT:

Appellants' emergency motion for stay of trial pending appeal is DENIED.

Issued as Mandate: July 11, 1990

TJOFLAT, Chief Judge, specially concurring:

Plaintiff-appellee brought a civil rights action, under 42 U.S.C. § 1983, against governmental and individual defendants. Plaintiff also brought several state-law claims against the individual defendants. Five individual defendants are now appealing from the district court's denial of their motion for summary judgment based on qualified immunity with respect to the section 1983 claim; they request a stay of trial pending appeal.

I concur in the denial of the stay only because constrained to do so by circuit precedent. Under recent decisions of this court, we lack jurisdiction over the denial of a summary judgment motion based on qualified immunity as to certain claims if the defendants would have to proceed to trial on other claims, arising from the same facts. *Schopler v. Bliss*, No. 88-5609 (June 22, 1990); *Green v. Brantley*, 895 F.2d 1387 (11th Cir. 1990) (mandate withheld). I am convinced that these cases sweep too broadly and, when extended to a case such as this, result in bad law. In this case, if the individual defendants are entitled to qualified immunity on the section 1983 claims, the only claims remaining against them would be state-law claims. They would proceed to trial on the state-law claims only if the district court exercised its discretion to retain those claims, under pendent-party jurisdiction, in order to have the claims litigated at the same time as the section 1983 claim against the governmental defendants. *See Giardiello v. Balboa Ins. Co.*, 1566, 1570 (11th Cir. 1988).

I submit that it might well be an abuse of discretion for the district court to exercise pendent-party jurisdiction under these circumstances: a section 1983 plaintiff could then defeat appellate jurisdiction to review a district court's rejection of an individual official's qualified immunity defense merely by appending state-law claims. This sort of manipulation would obviously circumvent the

policy of *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806 (1985), which enables us to take jurisdiction over the denial of a motion for summary judgment based on qualified immunity in order to protect the defendant's entitlement not to stand trial in federal court if his conduct did not violate a right clearly established at the time.

For the foregoing reasons, I concur in the denial of the stay but express misgivings about the decisions that require this result.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

Case No. GCA 88-10198-MMP

GREGG FITZGERALD BAILEY and LIZZIE SHIRLEY BAILEY,
Plaintiff,

v.

BOARD OF COUNTY COMMISSIONERS OF ALACHUA COUNTY, FLORIDA; L.J. "LU" HINDERY, Sheriff of Alachua County, Florida; the CITY OF GAINESVILLE, FLORIDA; JOHN STANTON TILESTON, SR.; JAMES STRAUSS; FARNELL COLE; GARY BROWN; TOM L. ALLISON; NATE CALDWELL; STEPHEN A. GARRAHAN and COLLEEN HAYES,

Defendants.

ORDER

[Filed Jul. 2, 1990]

Various defendants have filed motions to dismiss and for summary judgment. Based upon the following discussion, the motions are granted in part and denied in part.

OVERVIEW

This case arises out of the alleged false imprisonment of Gregg Fitzgerald Bailey, an Alachua County Detention Center (ACDC) officer. He alleges that he was the victim of an illegal sting operation conducted by officers of

ACDC, officers from three agencies acting as members of the Combined Narcotics and Organized Crime Unit (NOCU), and members of the state attorney's office.

Inmate Charles Jerkins was implicated in an April, 1987, escape attempt from ACDC, in which two other inmates were caught with hacksaw blades. Neither of the other inmates implicated Bailey. However, Jerkins suggested that a "professional" person was involved and promised cooperation in exchange for a transfer to a different area of the jail with more privileges.

The investigating officer at ACDC, Lt. Gary Brown, conferred with ACDC Assistant Director Tom Allison about the matter. Allison then conferred with ACDC Director Nate Caldwell, who authorized him to contact State Attorney Whitworth. With this approval, Allison instructed Brown to contact Whitworth. Whitworth instructed his investigator, John Tileston, to help ACDC. Tileston then contacted Basil Roundtree, commanding officer of NOCU, requesting help in executing the sting against Bailey.

The sting went as follows. On May 13, 1987, Jerkins was permitted to make a telephone call to Bailey. NOCU investigator Farnell Cole obtained bugging equipment and $500 from NOCU and took it to ACDC. With Allison's approval, recording equipment was set up in his office. Jerkins was brought to the office where ACDC Lt. James Strauss attached a body bug and gave him the $500.

When Bailey arrived for his shift late that evening, he told Strauss that an inmate had contacted him that afternoon, wanting him to take something out of the jail. Strauss allegedly told Bailey that he needed physical evidence before he could do anything about Jerkins. In the early morning, Bailey also told fellow ACDC officer C. W. Phillips about Jerkins' call the prior afternoon. In addition, Bailey told Phillips that he had previously written to ACDC Chief of Security, Maj. Stephen Garrahan, and had

talked to Strauss on several occasions about Jerkins improper contacts.

At about 6 a.m. on May 14, 1987, Jerkins and other inmates were allowed to enter the day room. A few minutes later, Jerkins signaled Bailey to come to the barred door separating the day room from Bailey's duty station. Jerkins handed a sock stuffed with $500 to Bailey. Bailey took the sock to a nearby desk, wrapped the money in a clean piece of paper, put the package in an unlocked drawer and returned the sock to Jerkins. Bailey asserts that he then tried twice to call his supervisor.

Bailey also asserts that he then saw inmate trustees approaching the unlocked desk as they brought breakfast to the other inmates. Thinking the money was at risk in the desk, Bailey put the money in his pocket and began supervising the inmates' meal. A few minutes later, Bailey was arrested for introducing hacksaw blades into the jail to aid an attempted prison escape. Immediately after the arrest, Bailey was given a letter informing him that dismissal proceedings would be started if he did not rectify the prerequisites of his job within 15 days. Bailey spent four days in jail before being released on bond. Effective May 26, 1987, he was suspended without pay until further notice.

On May 14, 1987, NOCU issued a news release about Bailey's arrest to the Gainesville area media. Caldwell and Allison also made statements about the arrest to WCJB television.

On July 8, 1987, the State Attorney's office filed criminal charges against Bailey for bribery, unlawful compensation and unlawful introduction into or possession of $500 in ACDC. On November 24, 1987, a *nolle prosequi* was entered for all charges against Bailey.

After the charges were dropped, Bailey wrote Caldwell requesting reinstatement with back pay and asking for a hearing if his request was denied. On December 7, 1987,

Allison wrote Bailey, denying his request. No hearing was held. On December 8, 1987, Garrahan wrote to the Florida Department of Law Enforcement (FDLE) regarding an investigation of Bailey. FDLE stated in a June 9, 1988, letter that there was no basis for further action against Bailey. Caldwell requested the investigation be reopened, and the investigation remains open today.

Bailey was ordered to return to work on June 20, 1988, and was informed that he would receive back pay. His psychiatrist advised against returning to work. Bailey presented a letter from his psychiatrist to ACDC and requested to be placed on sick leave. This request has never been granted.

ELEVENTH AMENDMENT IMMUNITY

Hindery, who is sued only in his official capacity as Alachua County Sheriff, asserts that he is a state officer and, therefore, entitled to summary judgment based on eleventh amendment immunity. As authority, Hindery relies on *Hamm v. Powell*, 874 F.2d 766, 770 (11th Cir. 1989), *modified on reh'g*, 893 F.2d 293 (11th Cir. 1990), *cert. denied sub nom., Hamm v. Norred*, No. 89-1699, 1990 WL 60615 (U.S. S. Ct. June 18, 1990). In that case, the court simply stated that Florida sheriffs are state officers and cited *Beard v. Hambrick*, 396 So. 2d 708 (Fla. 1981), to explain its statement. *Id.* at 770 & n.3.

On rehearing, the Eleventh Circuit withdrew the portion of its opinion discussing eleventh amendment immunity, simply stating that it need not reach that question. That question, however, clearly needs resolution in this case.

Plaintiffs assert that the decision in the original *Hamm* opinion is in conflict with other Eleventh Circuit decisions holding that Florida sheriffs are county officers and,

as such, are not entitled to eleventh amendment immunity. Plaintiff's assertion is very persuasive. Based on the following discussion, summary judgment on the issue of eleventh amendment immunity for Hindery is DENIED.

In *Lundgren v. McDaniel*, 814 F.2d 600, 605 & n.4 (11th Cir. 1987), another Eleventh Circuit panel noted that under the Florida Constitution, sheriffs are county officers. That panel concluded that the eleventh amendment did not bar suit on a pendant state claim against a sheriff, because he was not a state officer. Again in *Lucas v. O'Loughlin*, 831 F.2d 232, 234-35 (11th Cir. 1987), *cert. denied sub nom., St. Johns County v. Lucas*, 108 S. Ct. 1595 (1988), an Eleventh Circuit panel determined that "although elected by virtue of state law, he was elected to serve the *county* as sheriff." *Id.* (emphasis added). Under this scenario, actions of the sheriff were actions of the county. Finally, in *Owens v. Fulton County*, 877 F.2d 947, 950 (11th Cir. 1989), a panel ignored the original *Hamm*, decided less than two months earlier, and cited *Lucas* for the proposition that the court relies on state law in determining whether sheriffs are county officers.

The Florida Supreme Court case erroneously cited in *Hamm* for the proposition that Florida sheriffs are state officials, actually states unequivocally that sheriffs are county officers. "In our opinion, there is no reasonable way to construe article VIII, section 1, [of the Florida Constitution] other than to include sheriffs as well as other named county officers as part of a county . . . ." *Beard*, 396 So. 2d at 711. The Florida Supreme Court determined that as part of the county, sheriffs were subject to Florida's statute waiving sovereign immunity for "state agencies or subdivisions" which, under the act, included "counties and municipalities." *Id.* at 711-12, 709 n.1.

Apparently in Florida, *sovereign immunity* is much broader (including municipalities and local governments)

than *eleventh amendment immunity*. The eleventh amendment shields only *states* from suit in federal court, and there is no indication that Florida, instead of Alachua County, would have to provide funds to pay a judgment against Sheriff Hindery. *See Lucas*, 831 F.2d at 234 (counties liable for sheriff's department salaries and expenses); *Lundgren*, 814 F.2d at 605 n.4 (no facts to support contention that judgment against sheriff's office must be paid from state treasury rather than from county funds); *Hill v. Department of Corrections*, 513 So. 2d 129 (Fla. 1987), *cert. denied*, 484 U.S. 1064, 108 S. Ct. 1024 (1988) (sovereign immunity and eleventh amendment immunity are distinct concepts).

QUALIFIED IMMUNITY

Several defendants assert that they are entitled to qualified immunity for their actions concerning Bailey. James Strauss and Gary Brown are lieutenants with the Alachua County Department of Corrections. Tom L. Allison is the assistant director of ACDC. Nate Caldwell is the director of ACDC. Stephen A. Garrahan is chief of security for ACDC. Colleen Hayes is personnel director of ACDC. Farnell Cole is a deputy sheriff assigned to NOCU. And finally, John Tileston is an investigator with the state attorney's office.

The qualified immunity defense was articulated by the Supreme Court in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727 (1982). In *Harlow*, the Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818, 102 S. Ct. at 2738. The Supreme Court further explaned this "objective (albeit fact-specific)" test in *Anderson v. Creighton*, 107 S. Ct. 3034, 3040 (1987). The relevant question in each case is "whether a reasonable officer could have believed

[his or her conduct] to be lawful, in light of clearly established law *and the information [he or she] possessed.*" *Id.* at 3040 (emphasis added).

Bailey asserts that reasonable people in these defendants' positions would have known an arrest without probable cause violates clearly established law. After *Creighton*, however, this assertion sweeps too broadly. The relevant inquiry is whether each individual would have known that his or her actions violated clearly established law in light of the information that individual possessed at the time. Therefore, each individual must be considered separately to determine whether qualified immunity applies.

Bailey asserts that inquiry into the actual knowledge of each individual is not necessary. He suggests that in a conspiracy, as alleged in this case, each conspirator is charged with the knowledge and illegal actions of all co-conspirators. This is because each conspirator is considered the agent of every other conspirator.

Bailey's argument fails on one important point. To be held accountable for the wrongful acts of a conspiracy, one must be aware of the illegal purpose of the conspiracy. Merely "conspiring" or working together to make what appeared to be a legal arrest would not subject an individual to liability for the illegal acts of co-workers. Thus, what an individual actually knew or reasonably should have known is an important factor to consider in determining whether he or she entered an illegal conspiracy or is entitled to qualified immunity.

Bailey asserts that he told both Garrahan and Strauss that Jerkins had made several attempts to get Bailey to smuggle contraband into the jail. The last time Bailey told Strauss that Jerkins had made an improper contact was the day of Bailey's arrest. Bailey states that Strauss told him that he needed physical evidence before anything could be done about Jerkins' actions. Supported by dep-

ositions, consideration of these facts in the light most favorable to Bailey casts considerable doubt on whether a reasonable officer could have thought there was probable cause to arrest Bailey. Given the regulation requiring officers to confiscate contraband, the fact that Bailey had the $500 in his pocket does not save these defendants. Therefore, qualified immunity for Garrahan and Strauss is DENIED.

Facts about whether Tileston checked Jerkins' reliability and the results of any check are in dispute. *See* Plaintiff's reply to motion of defendants Hindery and Cole for summary judgment at 11 (entered on docket Sept. 5, 1989) (Doc. 276). In addition, Tileston himself stated that at the time of the arrest he was not certain that Bailey had done anything wrong. Tileston deposition vol. 1, p. 55. These facts are material to the question of whether Tileston reasonably could have believed he had probable cause to conduct the sting and arrest Bailey. Therefore, summary judgment based on qualified immunity for Tileston is DENIED.

There are no allegations that Brown, Allison, Caldwell, Hayes or Cole knew or should have known that Bailey had reported improper contacts by Jerkins. Nothing from the record indicates that they had reason to question Jerkins' reliability, especially in light of their reasonable assumption that Tileston had checked Jerkins' credibility. They should be able to rely on other officers' assessments of probable cause, absent some knowledge of their own sufficient to make them question probable cause. Bailey suggests that these defendants should have known that Jerkins was a hardened criminal, inveterate liar and manipulator whose allegations could not be relied upon to provide probable cause. This assertion, however, is unsupported by allegations of specific instances which would cause the defendants to question Jerkins. Many a case has been won on the testimony of "hardened criminals." Individuals in these defendants' positions rea-

sonably could have relied on their fellow workers' assessments of probable cause. Therefore, summary judgment for Brown, Allison, Caldwell, Cole and Hayes on the issue of qualified immunity regarding the sting and arrest of Bailey is GRANTED.

With regard to Bailey's initial suspension without pay from his job as a corrections officer, qualified immunity is GRANTED to Brown, Allison, Caldwell, Hayes and Cole. They reasonably believed that Bailey's suspension without pay without a pre-deprivation hearing was lawful, considering the seriousness of the charges against him. As mentioned above, they had no reason to question whether probable cause supported the charges. Qualified immunity for Garrahan, Strauss and Tileston is DENIED on the issue of the initial suspension.

Bailey's continued suspension without a hearing is a different matter. Although some delay between the deprivation and the hearing does not necessarily violate due process, Bailey has *never* received a hearing. The law is clear that Bailey was due some process within a reasonable time. Certain facts about who could have granted a hearing are missing from the record and are necessary to determine who, if anyone, is entitled to qualified immunity on this issue. Because material facts are absent regarding Brown, Allison, Caldwell or Hayes (all ACDC employees), summary judgment regarding Bailey's continued suspension without a hearing is DENIED. However, qualified immunity for Cole is GRANTED. As a member of NOCU, Cole was not in a position to provide post-deprivation relief to Bailey.

A similar result is reached regarding damage to Bailey's reputation. Any participation by Strauss or Garrahan in publication to the news media of Bailey's arrest or the allegations against him is not shielded by qualified immunity. As Hayes, Allison, Caldwell, Brown and Cole were not in possession of the same information as Strauss and Garrahan, they are GRANTED qualified im-

munity for any participation in the initial publication to the news media of accusations against Bailey.

The presence of stigmatizing information in Bailey's personnel file also implicates the liberty interest under the due process clause of the fourteenth amendment. *See Buxton v. City of Plant City*, 871 F.2d 1037, 1045 (11th Cir. 1989). Due process requires that Bailey be afforded a "name-clearing hearing" *and* notice of the right to such a hearing. *Id.* at 1046. Although for the purpose of qualified immunity this right as applied to information in a personnel file was not clearly established in this circuit until May 1, 1989, *see Buxton, supra*, the harm is ongoing and Bailey still has not been given a hearing. Therefore, those in charge of Bailey's personnel files and those who could grant a name-clearing hearing to him are not entitled to qualified immunity for their continued failure to provide a hearing. As the record does not clearly indicate who is in charge of Bailey's files and who can grant a hearing, the motion for qualified immunity on this issue is DENIED.

As shown above, Cole is entitled to qualified immunity on all federal causes of action. Therefore, all pendent claims against Cole are DISMISSED WITHOUT PREJUDICE. However, this court would be open to a motion to reconsider the dismissal without prejudice if the statute of limitations has run on the state claims. *See Roper v. Edwards*, 815 F.2d 1474, 1477-78 (11th Cir. 1987).

RESPONDEAT SUPERIOR

Hindery, Alachua County and Gainesville assert that they were not involved in any of the actions which allegedly caused violations of Bailey's civil rights. Thus, they suggest that they are entitled to summary judgment, because respondeat superior is not a viable theory of liability under 42 U.S.C. § 1983. *See Monell v. Department of Social Servs.*, 436 U.S. 658, 691, 98 S. Ct. 2018, 2036 (1978).

Bailey asserts that he does not allege liability on the basis of respondeat superior. Rather, he states that each of these defendants is directly liable for acts pursuant to their policies or customs as those terms have been construed and applied by the Supreme Court in *City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S. Ct. 915 (1988), and *Pembaur v. Cincinnati*, 475 U.S. 469, 106 S. Ct. 1292 (1986).

Case law is clear that vicarious or respondeat superior liability is not available under 42 U.S.C. § 1983. *Monell*, 436 U.S. at 691, 98 S. Ct. at 2036. Unless defendants were personally involved in the actions giving rise to a section 1983 claim, they may not be held liable unless they established some practice or policy which made the actions likely to occur. *Id.*

Although liability without personal involvement requires some policy, liability may be imposed for a single decision under appropriate circumstances. *Pembaur*, 475 U.S. at 480, 106 S. Ct. at 1298. Liability attaches only where "a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Id.* at 483-84, 106 S. Ct. at 1300 (plurality opinion). The authority to make final policy may be legislatively delegated or may be delegated by an official who possesses such authority. Whether an official has final policymaking authority is a question of state law. *Id.*

In this case, *Alachua County* is liable under section 1983 for the actions of Hindery. *See Lucas v. O'Loughlin*, 831 F.2d 232, 235 (11th Cir. 1987), *cert. denied sub nom., St. Johns County v. Lucas*, 108 S. Ct. 1595 (1988) (trial court erred in dismissing county). Thus, Bailey seeks to hold Hindery, Alachua County and Gainesville liable because they delegated policymaking authority to Basil Roundtree, the commanding officer of NOCU, who author-

ized NOCU's involvement in the sting. The question, then, is whether these defendants somehow delegated their authority so as to make Roundtree the official with final policymaking authority regarding which investigations to pursue and the methods used to pursue them.

NOCU was created by the agreement of the Alachua County Sheriff's Office, City of Gainesville Police Department and the University of Florida Police Department. Voluntary Cooperation Agreement (May 22, 1986) (Doc. 159, exhibit 23) [hereinafter VCA]. The agreement provides for a governing board consisting of the Alachua County Sheriff, the Chief of the Gainesville Police Department and the Chief of the University of Florida Police Department, or their designees. VCA para. 5(a). "The Governing Board shall be authorized as necessary with respect to the administration of this agreement to establish policy, promulgate rules and regulations, set guidelines and otherwise provide for the operation of the Combined Narcotics and Organized Crime Unit." VCA para. 5(b). In addition, the Governing Board has "plenary supervisory authority over the personnel participating in this agreement." VCA para. 5(a). Finally, the agreement requires the Governing Board to "appoint a person who shall have the responsibility for the day-to-day command and administration of the Combined Narcotics and Organized Crime Unit activities. Supervisory personnel from the respective participating agencies shall be deployed as directed by said appointee." VCA para. 5(a).

Without a doubt, the three agencies entering the agreement delegated their authority to make final policy to the NOCU Governing Board. Special difficulties arise, however, when it is contended that these policymakers delegated their authority to another official, in this case, Roundtree. It may not be possible to draw an elegant line between final policymakers and others, but the Supreme Court has provided some guidance.

> "When an official's discretionary decisions are constrained by policies not of that official's making,

> those policies, rather than the subordinate's departures from them, are the act of the municipality. Similarly, when a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with *their* policies."

City of St. Louis v. Praprotnik, 108 S. Ct. 915, 926 (1988) (emphasis in original). In *Praprotnik*, the mayor and aldermen developed policies regarding promotions and transfers of city employees. They also created a municipal Civil Service Commission to review and correct any improper decisions made pursuant to their policy. In fact, the Commission actually reviewed Praprotnik's case. Under this scenario, the Court found that the individuals making the employment decisions were not final policymakers and the municipality was not liable for their actions not in keeping with city policy.

In the current case, the agreement specifically states that the Governing Board makes policy and that a person appointed by the board is responsible for the day-to-day administration of NOCU. At first glance, this seems like the situation in *Praprotnik* in that Roundtree "had the authority to determine how best to *effectuate* a policy announced by his superiors, rather than the power to *establish* that policy." *Id.* at 933 (Brennan, J., concurring) (emphasis in original). Conceivably, the analysis could stop here with the conclusion that the Governing Board, not Roundtree, had policymaking authority.

However, *Praprotnik* recognized that a plaintiff may be able to prove a practice that, although not recognized by written law or express municipal policy, is so widespread and well-settled as to have the force of law. *Praprotnik*, 108 S. Ct. at 926. In that sort of situation, the municipality is held liable for the injuries inflicted pursuant to its "practice." It appears from Roundtree's

testimony that the Governing Board never established policy to guide or constrain Roundtree's discretion.

Roundtree stated that there is no written document which prescribes the parameters of when NOCU could become involved in an investigation. Roundtree, 19. With regard to operations and procedure, Roundtree stated that he and his second-in-command, Lt. Morrow, maintain a NOCU manual which they update by adding or deleting materials as they see fit.

Although the Governing Board theoretically supervises all NOCU personnel, Roundtree did not obtain and did not feel he needed approval from anyone to involve NOCU in an investigation. As commander, he had the authority to make those decisions. Roundtree, 19. Finally, nothing in the record indicates that the Governing Board actually reviewed Roundtree's decisions. Thus, it appears that the Governing Board's practice and custom was to give unfettered discretion, amounting to policymaking authority, to Roundtree.

This case appears similar to the situation in *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S. Ct. 1292 (1986). In *Pembaur*, sheriff's deputies were unable to get consent to enter a doctor's office to serve arrest warrants on other individuals. Following standard office procedure, the sheriff's office requested advice from the prosecutor's office and then followed the prosecutor's instructions, axing down the doctor's door. The Court determined that under these circumstances, the authority to make final policy had been delegated to the prosecutor. Thus, the sheriff was liable for the prosecutor's decisions.

In the present case, Roundtree decided when to involve NOCU in investigations and what methods would be used to pursue those investigations. He was the final authority. From the record, it appears that his authority was not circumscribed by the Governing Board's policy or oversight. Thus, Roundtree was the official with au-

thority to make final policy for Hindery, Alachua County and Gainesville regarding NOCU investigations and tactics. Therefore, they are liable for Roundtree's actions under section 1983.

Gainesville admits that it delegated final policymaking authority regarding NOCU to the NOCU Governing Board pursuant to the voluntary cooperation agreement. Gainesville trial brief at 2 (entered on docket Sept. 20, 1989) (Doc. 308). The same analysis that would make Hindery liable for the actions of NOCU applies to Gainesville. See above discussion. Gainesville, however, correctly points out that the voluntary cooperation agreement had expired. Therefore, the city asserts that the delegation of its authority had ended. Gainesville's assertion is without merit.

The Supreme Court has recognized that, although not recognized by written law (or in this case, an existing contract) or express municipal policy, a practice may be so widespread and well settled as to have the force of law. *City of St. Louis v. Praprotnik*, 108 S. Ct. 915, 926 (1988). Although the parties to the cooperation agreement did not renew the agreement when it expired, they continued to operate as though it were still in force. Thus, the city's policies evidenced by the written agreement continued to operate with the force of law after the writing expired.

Gainesville's assertion that it cannot be held responsible for the actions of sheriff's deputies assigned to NOCU is also without merit. The effect of the cooperation agreement is to create a combined law enforcement unit composed of officers from the city, county and university. Once assigned to the unit, the officers are given assignments and act without regard to which entity assigned them to NOCU. Furthermore, NOCU acts equally on behalf of all of the parties to the cooperation agreement. Thus, regardless of who pays NOCU officers, they are all agents for each party to the cooperation agree-

ment; and each party to the agreement is liable for NOCU officers' actions as though they were their own employees.

Bailey also alleges that application of the county's employment policies regarding suspension failed to provide due process when applied to his situation. Bailey's suspension was pursuant to the following policy: "loss of necessary prerequisites or abilities to perform the job (15 calendar days shall be given to regain prerequisites or abilities. If not regained, dismissal is warranted)." Alachua County Personnel Regulations, part VI § 3.1. Alachua County makes no assertions regarding the adequacy of its policy in its motion for summary judgment.

Furthermore, Bailey asserts that once the commissioners had notice of wrongful actions against him, they did nothing to rectify them. Among other things, Bailey asserts that the commissioners' failure to provide a name-clearing hearing or to remove mention of the arrest, suspension and investigation from his personnel file, is a continuing wrong for which the county is directly responsible.

Summary judgment based on respondeat superior is DENIED.

PROBABLE CAUSE

Several defendants assert that they are entitled to summary judgment on the issue of probable cause. Summary judgment on this issue should be denied because material facts are in dispute. *See* Fed. R. Civ. P. 56.

To determine which facts are "material," one must know the standard which will determine the issue. Officers have probable cause to arrest when "the facts and circumstances within the *collective knowledge* of the law enforcement officials, of which they had *reasonably trustworthy information*, are sufficient to cause a person of

reasonable caution to believe that an offense has been or is being committed." *Wilson v. Attaway*, 757 F.2d 1227, 1235 (11th Cir. 1985) (emphasis added) (quoting *United States v. Pantoja-Soto*, 739 F.2d 1520, 1523 (11th Cir. 1984), *cert. denied*, 470 U.S. 1008, 105 S. Ct. 1369 (1985)). In the case at hand, several facts bearing on probable cause are in dispute.

For instance, the time between Bailey's taking the money and his arrest is disputed. Bailey suggests that it was no more than ten or fifteen minutes, during which time he says he tried twice to call his supervisor about the money. Defendants suggest it was over an hour and that Bailey could have contacted his supervisor in that amount of time. If there were regulations requiring confiscation of contraband as Bailey suggests ($500 in considered contraband), then the time lapse would be important in determining whether taking the money provided probable cause to arrest or simply showed that Bailey was following regulations.

Bailey also disputes whether Tileston really checked with other law enforcement officers to determine whether Jerkins was a reliable informant. Two officers who might have been logical choices to check with stated in their depositions that they did not recall Tileston inquiring about Jerkins' credibility.

Finally, Bailey asserts that he told Strauss, Garrahan and Phillips that Jerkins had made improper contact with him on several occasions. The last time Bailey told Strauss was the night of the sting. If proven, it would be difficult to find probable cause in light of the fact that the court must consider "the *collective knowledge* of law enforcement officials" in determining whether probable cause existed. *Wilson*, 757 F.2d at 1235 (emphasis added). Thus, summary judgment on the basis of probable cause is DENIED.

FAILURE TO STATE A CLAIM

Defendants assert that they are entitled to summary judgment because Bailey only alleges negligent deprivation of due process under the fourteenth amendment. Merely negligent failure to provide due process fails to state a claim under 42 U.S.C. § 1983. *See Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662 (1986).

The facts alleged in Bailey's first amended complaint indicate that the conduct was something more than negligent, maybe willful. Additionally, Bailey alleges that he was arrested without due process *and* without probable cause. This indicates a substantive claim based on Bailey's fourth amendment right not to be arrested without probable cause. Although mere negligence may not state a claim for relief from due process violations under section 1983, just what mental state is required depends on which right is violated. *Daniels v. Williams*, 106 S. Ct. 662 (1986). As mentioned above, Bailey has provided affidavits supporting alleged facts which, if proven, would show something more than mere negligence.

Several defendants also assert that they did not deprive Bailey of a liberty interest (reputation). However, the fourteenth amendment protects people's liberty interest in their reputations when government actions which stigmatize their reputations are coupled with some other harm. Therefore, a state actor cannot publish false or defamatory statements about people in conjunction with altering a status recognized under state law (such as public employment) without subsequently notifying them that they have the right to a hearing to attempt to clear their names. *See Paul v. Davis*, 424 U.S. 693, 96 S. Ct. 1155 (1976); *Campbell v. Pierce County*, 741 F.2d 1342, 1345 (11th Cir. 1984), *cert. denied*, 470 U.S. 1052, 105 S. Ct. 1754 (1985).

Finally, Gainesville asserts that section 1983 does not permit claims based on conspiracy. The Eleventh Circuit,

however, does recognize a section 1983 cause of action for conspiracy to commit substantive section 1983 violations. *See Slavin v. Curry*, 574 F.2d 1256, 1261 (5th Cir.), *modified on other grounds*, 583 F.2d 779 (5th Cir. 1978).[1]

Bailey has sufficiently stated his section 1983 claims in Counts 1-3. Therefore, summary judgment for failure to state a claim is DENIED.

LOSS OF CONSORTIUM

Defendants argue that they are entitled to summary judgment on Lizzie Shirley Bailey's claims for loss of consortium. They argue that there is no federal right to consortium, and section 1983 only provides redress for violations of federal rights.

Bailey asserts that state law determines what is a liberty interest entitled to due process before deprivation and that Florida recognizes a liberty interest in consortium. As authority, he cites to *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701 (1972). *Roth*, however, does not analyze state law to determine *liberty* interests entitled to due process. The Supreme Court in *Roth* stated only that state law determines *property* interests entitled to due process. *Id.* at 572-78; 92 S. Ct. at 2706-10.

Consortium does not exist as a federal right. *Gresham v. Dell*, 630 F. Supp. 1135 (N.D. Ga. 1986). Thus, summary judgment in favor of all defendants on Lizzie Bailey's loss of consortium claims is GRANTED. Lizzie Bailey has no other federal question claim. Accordingly, her pendant state claims are DISMISSED.

SOVEREIGN IMMUNITY

Defendants assert that they are entitled to sovereign immunity for the pendant state claims. As discussed above, sovereign immunity in Florida covers officials of

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[1] This case is binding precedent on the Eleventh Circuit under *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

municipalities and local governments. Those officials may be held liable only to the extent that sovereign immunity has been waived. Florida's waiver statute provides:

> No officer, employee, or agent of the state or of any of its subdivisions shall be held personally liable in tort *or named as a party defendant* in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of his employment or function, unless such officer employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. . . . The exclusive remedy for injury or damage suffered as a result of an act, event, or omission of an officer, employee, or agent of the state or any of its subdivisions or constitutional officers shall be by action against the governmental entity, or the head of such entity in his official capacity, or the constitutional officer of which the officer, employee, or agent is an employee . . . .

Fla. Stat. § 768.28 (emphasis added).

Bailey asserts that this statute simply requires that the judge enter judgment against *either* the employee *or* the governmental entity. In other words, Bailey asserts that the statute deals exclusively with what remedy is available and does not require a choice until the end of trial. The defendants assert that the statute requires a choice at the beginning of the suit. Plaintiffs must choose early who to sue.

The defendants' argument is supported by the statute itself and Florida case law. The statute provides that no employee "shall be held personally liable in tort *or named as a party defendant.*" Fla. Stat. § 768.28 (emphasis added). If the statute only required a choice of remedies at the end of suit, anyone could be *named.* This statute, however, provides immunity against having to go to trial.

A Florida court reached the same conclusion in *Wilson v. Duval County School Bd.*, 436 So. 2d 261, 263-64 (Fla. 1st Dist. Ct. App. 1983). The court commented that the statute is substantive and regulates *whether*, not when, parties may be joined as defendants. The court found that under the statute "the substantive liability of the school board and its employees is mutually exclusive." *Id.* at 263. The employees may not be sued for negligence, and the governmental entity may not be sued for its employees' malicious or bad faith acts.

In this case, Counts 4-6 allege conduct that was taken "in bad faith, with malicious purpose, in a manner exhibiting wanton and willful disregard of BAILEY's rights." Therefore, immunity for the individual defendants named in these counts is DENIED. Immunity based on this statute is GRANTED to Hindery as sheriff, Alachua County and Gainesville.

Counts 7 and 8 do not allege bad faith conduct. Therefore, immunity based on 768.28 is GRANTED to defendants sued in their individual capacities. Immunity on these counts for Hindery as sheriff, Alachua County and Gainesville is DENIED.

FLORIDA STATUTES § 112.532

The defendants assert that Bailey has attempted to state a cause of action in Counts 7 and 8 based on Florida Statutes § 112.532 and that the attempt must fail. Section 112.532 is often referred to as the Police Officers' Bill of Rights. It provides certain protections to officers under investigation or subject to disciplinary action by their employer. If the officer's employer fails to comply with the Police Officers' Bill of Rights, the officer may apply to the state circuit court for an injunction to restrain and enjoin the violations and to compel performance in keeping with the Officers' Bill of Rights. Fla. Stat. § 112.534.

Defendants correctly point out that section 112.534 is the exclusive remedy for violations of section 112.532. *See City of Miami v. Cosgrove*, 516 So. 2d 1125 (Fla. 3d Dist. Ct. App. 1987). In *Cosgrove*, the officer sued the city for violations of subsections 112.532(4) & (5), which deal with notice of disciplinary action and retaliation for exercise of rights. The court held that the officer's sole remedy was through section 112.534 and, therefore, ordered that the claims for damages pursuant to section 112.532(3) be dismissed.

Florida Statutes section 112.532(3) provides:

> Every law enforcement officer or correctional officer shall have the right to bring civil suit against any person, group of persons, or organization or corporation, or the head of such organization or corporation, for damages, either pecuniary or otherwise, suffered during the performance of the officer's official duties or for abridgment of the officer's civil rights arising out of the officer's performance of official duties.

The Third District Court of Appeal noted that Cosgrove's claim focused on a violation of section 112.532 alone. Therefore, it did not consider whether other remedies were available under other "conceivable but unpleaded theories." *Cosgrove*, 516 So. 2d at 1127 n.1; *see, e.g., Metropolitan Dade County v. Sokolowski*, 439 So. 2d 932 (Fla. 3d Dist. Ct. App. 1983) (action for damages may be proper for constitutional procedural due process violations).

Bailey's first amended complaint alleges violations of his civil rights guaranteed by the constitution and laws of Florida. Thus, to the extent that Bailey seeks damages for violation of his rights under Florida's constitution, summary judgment is DENIED. To the extent that Bailey seeks damages for violations of Florida Statutes section 112.532, summary judgment is GRANTED.

FLORIDA STATUTES § 448.08 ATTORNEY'S FEES

Bailey concedes that he is not entitled to attorney's fees for the pendant state claims, except for those fees spent collecting back wages from the county. Bailey asserts that he is entitled to attorney's fees for collecting back wages pursuant to Florida Statutes section 448.08. Bailey is mistaken. Just because damages may be measured by the amount of lost wages, does not mean that the suit is an action for back wages. To receive attorney's fees pursuant to section 448.08, the suit must be based on the general labor regulations of Chapter 448, Florida Statutes. *Buena Vista Const. v. Carpenters Local Union*, 472 So. 2d 1357, 1358 (Fla. 5th Dist. Ct. App. 1985), *disagreed with by, Fewox v. McMerit Const. Co.*, 556 So. 2d 419 (Fla. 2d Dist. Ct. App. 1989). This suit is not based on Chapter 448. Therefore, Bailey is not entitled to fees under that chapter and all pendant claims for attorney's fees are DISMISSED. *See Fox v. West Palm Beach*, 383 F.2d 189 (5th Cir. 1967) (Florida follows the "American Rule").

FAILURE TO STATE A CLAIM FOR STATE CLAIMS

Defendants seek dismissal of counts alleging malicious prosecution, false arrest and imprisonment, and conspiracy. They suggest that Bailey failed to state claims for relief because he did not make sufficient factual allegations.

The complaint alleges sufficient involvement by each defendant in an arrest without probable cause to state a cause of action. *See Johnson v. Weiner*, 19 So. 2d 699, 700-01 (Fla. 1944). In addition, Bailey has made sufficient factual allegations to make out a prima facie claim for malicious prosecution. *See Burns v. GCC Beverages, Inc.*, 502 So.2d 1217, 1218 (Fla. 1987). As Bailey has sufficiently alleged facts to support the substantive counts, his factual allegations are sufficient to support his con-

spiracy counts. Therefore, defendants' motion to dismiss for failure to state a claim is DENIED.

PUNITIVE DAMAGES

Bailey admits that he is not entitled to punitive damages against the government entities. Therefore, all claims for punitive damages against Gainesville, Sheriff Hindery and Alachua County are DISMISSED.

DONE AND ORDERED this 2nd day of July, 1990.

/s/ Maurice M. Paul
United States District Judge

APPENDIX I

Bailey v. Alachua County, et al.
Case No. GCA-88-10198-MMP (M.D. Fla.)

Strauss, Brown,
Allison, Caldwell
Garrahan and Hayes

Request No. ——

QUALIFIED IMMUNITY

Defendants, Strauss, Brown, Allison, Caldwell, Garrahan and Hayes have been sued in their individual capacities. Under the law, as individuals they are immune from suit for any acts carried out by them within their discretion and within the scope of their responsibilities. The only exception to their immunity from suit is if they took actions which they knew or should have known clearly violated Plaintiff's constitutional rights. If, at the time they acted, it was unclear whether their actions, individually, violated Plaintiff's rights, then they cannot be held liable for those actions.

If you find that Plaintiff's rights were violated in this case, then you must next find whether or not Defendants Strauss, Brown, Allison, Caldwell, Garrahan or Hayes took any action which violated Plaintiff's rights. If you find that they took an action which violated Plaintiff's rights, then you must determine whether Plaintiff's rights were clearly established in law at the time of their violation and specifically that a reasonable person in the position of Defendants Strauss, Brown, Allison, Caldwell, Garrahan or Hayes knew or should have known of this law as it applied to the facts of this case.

Concerning whether Plaintiff's constitutional rights were clearly established at the time they acted, I will advise you as to what the law was and whether it was

clearly established. Your function is to then determine whether Plaintiff has met his burden of proving that these Defendants knew or should have known what Plaintiff's rights were and that their acts violated these rights. If you find that a reasonable person in their position would not have known that the law was clear, or that under the circumstances would not have known that their acts violated Plaintiff's constitutional rights, then you must find that they are immune from this suit.

Harlow v. Fitzgerald, 457 U.S. 800 (1982);
Davis v. Scherer, 68 U.S. 183 (1984);
Mitchell v. Forsyth, 472 U.S. 511 (1985);
Rich v. Dollar, 841 F.2d 1558 (11th Cir. 1988);
Zeigler v. Jackson, 716 F.2d 847 (11th Cir. 1983)

Granted ——

Denied ——